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No. 414

In the Supreme Court of the United States

OCTOBER TERM, 1951

KONRAD G. JOHANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL MANDEL, ADMINISTRATOR OF THE ESTATE OF ROBERT WILLIE DILLEHAY, JR., DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 401

KONRAD G. JOHANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 414

SAMUEL MANDEL, ADMINISTRATOR OF THE ESTATE OF ROBERT WILLIE DILLEHAY, JR., DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

In No. 401, the *Johansen* case, the opinion of the District Court for the Southern District of New

York (JR. 11) [1] is reported at 1951 A.M.C. 117. The opinion of the Court of Appeals for the Second Circuit (JR. 15) is reported at 191 F. 2d 162.

In No. 414, the *Mandel* case, the opinions of the District Court for the Eastern District of Pennsylvania (MR. 23, 61) [1] are reported at 74 F. Supp. 754 and 93 F. Supp. 692. The opinion of the Court of Appeals for the Third Circuit (MR. 100) is reported at 191 F. 2d 164.

JURISDICTION

In No. 401, the judgment of the Court of Appeals was entered on July 30, 1951 (JR. 18), the petition for a writ of certiorari was filed on October 26, 1951, and was granted on January 2, 1952 (JR. 19). In No. 414, the judgment of the Court of Appeals was entered on August 16, 1951 (MR. 109), the petition for a writ of certiorari was filed on November 6, 1951, and was granted January 2, 1952 (MR. 110). In both cases, the jurisdiction of this court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether members, or dependents of members, of the civil service component of crews of military transport vessels have a right of action against the United States for sickness, injury, or death in the performance of duty or whether they must accept as their sole recovery the benefits of the federal compensation, paid leave, and retirement provisions applicable to them.

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[1] Throughout this brief the abbreviation "JR." refers to the *Johansen* record, the abbreviation "MR." to the *Mandel* record.

STATUTES INVOLVED

The pertinent provisions of the Public Vessels Act of 1925, of the Federal Employees Compensation Act of 1916, as amended, and of the Federal Employees Compensation Act Amendments of October 14, 1949, c. 691, 63 Stat. 854, are set forth in the Appendix, *infra*, pp. 94-102.

STATEMENT

In these two cases, the respective petitioners, after accepting certain benefits under the Federal Employees Compensation Act, brought suit under the Public Vessels Act, claiming a right of action against the United States for injury and death in the performance of duty as members of the civil service component of the crew of military transport vessels. The cases thus involve the common question of the rights of members (and their dependents) of the civil service crew of transport vessels of the armed services who sustain service-incident sickness, injury, or death. In each case, the Government's sole contention is that petitioners have no right of action against the United States because the compensation and related benefits which are available to such civil service crew members are exclusive. The cases are therefore briefed together.

The principal difference in the two cases lies in the fact that in No. 401, the *Johansen* case, petitioner was aboard an Army transport engaged in a routine peacetime military operation in New York harbor and not in warlike operations, while in No.

414, the *Mandel* case, petitioner's decedent met his death aboard an Army transport tug boat engaged in warlike operations in the presence of the enemy. Although this difference is not significant, in our view, to the decision of the basic question, the underlying facts and the progress of the cases through the lower courts differ:

No. 401, *Johansen*. The facts may be summarized from the compensation record.[2] Petitioner Johansen was a carpenter in the civil service component of the crew of the Army Transport *Kingsport Victory*. On August 5, 1949, he sustained a lacerated leg in the course of his duties aboard the vessel which was lying at a pier at the Bethlehem Shipyard, Brooklyn, N. Y. Petitioner's own account of the accident, as contained in his affidavit of claim (photostat 14 of exhibits, cf. photostat 11), is as follows: "I was engaged in dismantling wooden sheathing in lower #4 hold. I was prying timbers from bulkhead. After reaching a height of approximately seven feet, I pried out some vertical timbers in order to leave the remaining timbers fall to the deck, and the sheathing collapsed." Petitioner was admitted to the Marine Hospital that day as a beneficiary of the Bureau of Employees Compensation, was treated until October 24, 1949, and was returned to duty November 7, 1949. In accordance with sections 7 and 8 of the Federal Em-

[2] The exhibits which were filed in the District Court (JR. 14) have not been printed but they have been transmitted to this Court as a part of the record.

ployees Compensation Act (5 U.S.C. 757, 758), petitioner elected not to take his sick or annual leave but to file claim for compensation benefits. An award was made him and he collected a total of $358.20. On February 6, 1950, petitioner filed a libel in admiralty (JR. 4), alleging that the United States was the owner and operator of the Army Transport, a public vessel of the United States, and that he and the other members of its crew "were in the employ of the respondent" when, on August 5, 1949, he was injured abroad the vessel "when certain lumber was caused to collapse, all by reason of the negligence of the respondent and the unseaworthiness of the vessel." Recovery of "damages, wages, maintenance and cure in the sum of $25,000" was claimed.

The Government answered (JR. 5) and moved for dismissal or hearing in advance of trial on the questions involving the Federal Employees Compensation Act (JR. 7). The answer denied the existence of any right of action (JR. 5-6), alleging that petitioner was an employee of the United States entitled to the benefits of the Federal Employees Compensation Act, that he had filed a claim and obtained compensation payments under that Act thereby electing its benefits, and that in any case petitioner's rights under the Compensation Act were exclusive and he had no right of action maintainable by suit under the Public Vessels Act (JR. 6). Negligence, unseaworthiness, and any right of recovery were further denied, and the

negligence of the petitioner and his assumption of risks were pleaded (JR. 6). An affidavit of Government counsel (JR. 8), supporting the motion for a preliminary hearing, summarized the facts from petitioner's compensation file which was to be produced upon the hearing. Petitioner filed in turn a motion, returnable the same day as that of the Government, demanding production of petitioner's compensation file, including all medical and accident reports as well as other papers (JR. 9-11). An accompanying affidavit of petitioner's counsel asserted, *inter alia*, that petitioner was never made aware of his "right" to sue under the Public Vessels Act, did not understand that acceptance of compensation benefits constituted a waiver of any other rights, and could not therefore "elect" to receive compensation benefits (JR. 10).

The matter was heard by Judge Conger, who after hearing counsel and considering their affidavits, made orders denying petitioner's motion for production as moot (JR. 11), granting the Government's motion, and dismissing the libel (JR. 12).

Judge Conger also filed a memorandum of opinion (JR. 11), stating that "It is plain that the [Federal Employees Compensation] amendments of 1949 were not intended to change the prior rights of seamen except to the extent of further coverage under the Act". He rejected the argument that petitioner "could not have 'elected' because he was unaware of an alternative", holding that his filing

a claim and receiving compensation was effective to preclude him. Petitioner's proposed counter order (JR. 13), including proposed additional findings as to the Government's failure to advise petitioner concerning his rights and the absence of any final adjudication of his claim for compensation, was rejected.[3]

On appeal, the Court of Appeals for the Second Circuit affirmed in an opinion by Judge Chase, joined in by Judge Learned Hand. Decision was rested on the ground that compensation is exclusive where injury is in line of duty, so that members of the civil service component of the crew of Army Transports who are injured in the course of routine military operations have their exclusive rights against the United States under the Federal Em-

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[3] At the hearing of the motions, petitioner's counsel had argued that the compensation payments were voluntary and without final adjudication. Government counsel explained that the statute does not require formal hearings or formal documents for awards, and such formal proceedings are not had on uncontested claims. The "consideration of the claim" the "findings of facts" and the "award" required for final adjudication by section 36 of the Act (5 USC 786) are all included in the second and third "blocks" of the Summary Sheet Form CA 25 (photostat 1 of the exhibits).

In answer to inquiries from the bench, Government counsel also informed the court that the Government's position had always been that compensation and related benefits constituted the exclusive right of members of the civil service component of the crews of military vessels and that therefore no recovery could be had when suit is brought under the Public Vessels Act. Counsel stated that, in view of the Government's position and standing instructions, it might be presumed that petitioner was never advised that he had a right to elect as between compensation benefits on the one hand, and a suit for damages for personal injuries, on the other.

ployees Compensation Act (JR. 15).[4] The court explained (JR. 17) that since petitioner would have been limited to suit alone, if he had been employed on a private or Government merchant vessel, and to compensation alone, if employed in the military service, "allowing him but one means of recovery will appropriately fit 'into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole,'" citing *Feres* v. *United States*, 340 U.S. 135, 139. The court added (JR. 17) that "We should not, without clear warrant in the statutory language, attribute to Congress an intent to permit civilian members of the crew of such a vessel to have an election denied enlisted members of the crew. The first have their rights under the Federal Employees Compensation Act, the second their rights as enlisted men to be compensated for service-connected injuries; the first, no more than the second, have been given the right to elect to sue the government rather than to accept such compensa-

[4] The court stated "We understand that the parties agree that the transport was engaged in a military operation when he was, on August 5, 1949, hit by falling lumber and injured, allegedly because of the negligence of the appellee or because of the unseaworthiness of the vessel" (JR. 15). Although he did not move for rehearing below, petitioner now, for the first time, challenges this statement and asserts in his brief that the vessel was not so engaged (Br. 2). Petitioner until now never claimed that the vessel was engaged in a non-military or commercial operation. So far as the compensation file indicates, the Army Transport involved was engaged in an ordinary routine peacetime military operation and was at a dock at the Bethlehem Shipyard, Brooklyn, repairing between voyages. All our information is to the same effect.

tion." Judge Frank dissented, stating that in his view petitioner had a right of election and had not exercised it.

No. 414, *Mandel.* Libelant's decedent, Robert W. Dillehay, was Third Assistant Engineer of the United States Army Tug LT-221, which was permanently assigned to the Mediterranean Theater of Operations. On October 15, 1944, Dillehay, eight other members of the army crew, and two naval ratings from the navy liaison group aboard, met death in the presence of the enemy when the LT-221 was destroyed by a mine in attempting to enter the port of Cagliari, Sardinia.

Dillehay was survived by a widow and an infant daughter born February 13, 1943. On behalf of the daughter, the widow applied for and obtained an award of compensation under the Federal Employees Compensation Act. Monthly payments of $87.91 are being currently made to the widow on that account and will continue until the child dies, marries, or reaches the age of eighteen. Although she had signed a general release (MR. 82-83) in consideration of the payments made the child, the widow, on her own behalf, procured the appointment of an administrator who brought this suit for $150,000 against the United States under the Suits in Admiralty Act.

Petitioner's libel (MR. 3) alleged that the United States owned and operated "the tug LT-

221 as a merchant vessel in foreign commerce" and Dillehay was employed as a member of its crew when on October 15, 1944, while the vessel was "at or near the port of Cagliari, Sardinia", the vessel suffered a violent explosion and he was killed. Negligence of the United States was alleged both in respect of the operation of the vessel and of the mine-control installations and procedures of the military authorities of the port.[4a] The following particulars were specified, among others (MR. 4-5):

> (b) failing to direct the course of the vessel in such a manner so as to avoid the mine field or other dangerous area, the existence of which the respondent knew or should have known;
>
> * * * * *
>
> (d) failing to provide, maintain and operate a proper and adequate degassing device or system, or other anti-mine machinery and equipment;
>
> * * * * *
>
> (f) causing the explosion as aforesaid;
>
> (g) failing to provide, maintain and operate proper and adequate warning and signal devices;
>
> (h) failing to give plaintiff's intestate prompt and adequate warning of his danger under the circumstances; * * *.

[4a] Cf. the statement of the Secretary of War: "The vessel was engaged exclusively in a military operation in time of war when it was sunk in the gulf of Cagliari in a minefield in a forward combat area" (MR. 64).

The Government objected to the libel by means of exceptions (MR. 6), exceptive allegations (MR. 8), and a motion to dismiss (MR. 10), all setting forth (1) that the vessel was a public vessel of the Army and there was no jurisdiction under the Suits in Admiralty Act, (2) that the right to compensation benefits was exclusive of any right of action under the Public Vessels Act, and (3) that the widow's acceptance of compensation benefits on account of her daughter precluded her from suit.

The District Court rejected the Government's objections, holding that the Suits in Admiralty and Public Vessels Acts should be read together so as to give crew members of every type of Government vessels the same rights. It stated that, except for members of the military component, "a seaman's remedies should not vary with the nature of the vessel upon which he is employed by the Government" (MR. 26, 74 F. Supp., at 755). The United States then answered (MR. 28), denying negligence and jurisdiction and pleading (1) that the right to compensation was exclusive and there was no right of action, (2) that the acceptance of compensation precluded suit, and (3) that recovery was barred by the execution of a special release.

In due course, interrogatories (MR. 31) were served and answered by the United States (MR. 33). The answers furnished the names and addresses of all witnesses and copies of all known

statements, reports, and documents relating to the case except the Report of the Army Board of Investigation (which includes the transcript of the testimony it heard). Although the Army had taken appropriate action under the Public Vessels Act (46 U.S.C. 784) to authorize petitioner to interview and subpoena the master of the tug (MR. 92), a motion for the production of the Army Board's Report was made (MR. 38) and sustained by Judge Kirkpatrick as to all except the testimony of the master (MR. 61, 93 F. Supp. 692). The evidence before the Board included, of course, testimony relating primarily to the conduct of military operations by military personnel (MR. 64). The United States moved for a rehearing (MR. 69), filing a formal claim of privilege by the Secretary of the Army (MR. 64), documents relating to the vessel's status (MR. 65-68), and to the compensation award (MR. 73-88). Judge Kirkpatrick denied the motion and entered an interlocutory decree of default against the United States (MR. 90, 98), holding it liable on the merits and ordering further proceedings to assess damages.

On appeal, pursuant to 28 U.S.C. 1292 (3), from the interlocutory decree the Court of Appeals for the Third Circuit unanimously reversed in an opinion by Judge Goodrich (MR. 100). It held that it was not necessary to decide the discovery question (MR. 102) since it concluded that the right to compensation and related benefits was ex-

clusive of any right of action which could be asserted by suit against the United States (MR. 103). It stated three reasons for this conclusion. (1) "It is the general rule that unless the [Compensation] act is by its terms optional, remedies provided by the act are exclusive when the act is applicable" (MR. 103). Exclusiveness of compensation will alone remove unfair discrimination. (2) It would be discriminatory to give members of the civil service component of the crew of military transports both the right to compensation benefits which is exclusive for the military component of such crews and denied to War Shipping Administration seamen, and also give them the right of recovery by suit which is exclusive for War Shipping Administration seamen and denied to the military component. "We think discrimination in favor of a civilian employee would be unfortunate unless such discrimination is expressly forced upon us by legislative mandate" (MR. 104-105). (3) Some of the cases which might arise could involve the conduct of military or semi-military operations. "It will not, we think, aid in the operation of the armed forces if the propriety of a commander's judgment is to be tested months or years afterwards by a court or a court and jury" (MR. 105). By way of example, the court referred to petitioner's attempt to discover the testimony before the Army Board of Investigation regarding the functioning of the military procedures involved (MR. 105-106).

SUMMARY OF ARGUMENT

It is agreed that the problem of whether petitioners can recover under the Public Vessels Act is not one of jurisdiction. As the court below observed in the *Mandel* case, No. 414, "May an injured person who is eligible to compensation claim additional rights against the United States? If so, we assume an action to enforce them could be maintained * * *" (MR. 103). The issue is one of right of recovery under the Public Vessels Act, as against exclusiveness of the compensation benefits to which petitioners are admittedly entitled. This problem is not confined to members of the civil service component of the crews of armed forces vessels. They are, indeed, the principal group but the question extends to the employees of every Government agency operating water craft. The crew of a patrol launch are public seamen during their performance of that duty, even though the majority of the time they are shoreside employees. Many public vessel civil service crew members are in the Fish and Wild Life Service, the Coast and Geodetic Survey, the Immigration and Naturalization Service and similar agencies. The general question of exclusiveness affects, moreover, all regular shoreside employees who filed suits against the United States before the Compensation Act amendments of 1949 (expressly declaring compensation benefits exclusive for the future[5]), and all

[5] The 1949 amendments also leave for judicial decision the question of exclusiveness for crew-members, such as petitioner Johansen and petitioner Mandel's intestate. *Infra*, pp. 19-22.

Government employees, such as Park Police, whose compensation is not under the Federal Employees' Compensation Act but under other special statutes not affected by the 1949 amendments.

I

Public vessel crew members—who are entitled to all the benefits of regular civil service employees, including compensation, paid annual and sick leave, retirements annuities and all related rights—should not be confused with merchant seamen who, whether employed by private operators or by the War Shipping Administration and its successor the National Shipping Authority, are excluded from compensation and the related benefits and have a right of action against their employer as their exclusive remedy for injury, illness, or death in the performance of duty.

Much of petitioners' argument is vitiated by their failure to recognize this distinction which exists between the rights of merchant seamen and those of public vessel seamen. Aside from the difference in the rights which Congress has given the two groups, there are fundamental distinctions in the nature and purpose of merchant vessels and public vessels. Thus, military transport vessels are auxiliaries to the fleet and are employed in military operations. They consist of hospital ships, troop transports, tug boats in combat areas and all such types of auxiliaries. They are manned by mixed crews of civil and military service per-

sonnel and all are subject to the same military discipline. The importance of not litigating matters effecting injury, sickness and death in the performance of duty is the same whether the individual involved is in the civil or military service component of the crew.

Merchant seamen have always been excluded from compensation and have insisted on that treatment. Public vessel seamen appear to have been of the contrary view. The difference in attitude probably lies in the fact that compensation under the Federal Employees' Compensation Act is more liberal than under other compensation statutes, not only as to amount but also as to coverage. While other acts contain the litigiously prolific phrase "arising out of and in the course of employment", the Federal Employees' Compensation Act says only that the injury must be "sustained while in the performance of his duty". Since under this Court's decisions everything a crew member does in the service of the ship is in the performance of his duty, the statute authorizes the broadest relief.

II

In 1943, Congress settled by the Clarification Act that seamen employed on merchant vessels of the War Shipping Administration (now the National Shipping Authority) should have their exclusive rights for service—incident injury,

sickness, and death by suit against the United States and should be excluded from all compensation, retirement, and related benefits. The discussions had in Congress at that time evidence a clear understanding that public vessel seamen have compensation, paid leave, and retirement benefits as their exclusive right while the exclusive right of WSA merchant seamen, like those in private employment, should be a right of action against their employer, the United States. This enactment was merely declaratory of the pre-existing law, as construed administratively and by the lower courts.

III

Construing the Public Vessels Act of 1925 and the Federal Employees' Compensation Act of 1916 together, in the light of their history and the consequences of the different interpretations urged by petitioners and the United States, shows that the Congresses which enacted them did not intend to give public vessel crew members an election between their right to compensation, paid leave, and retirement benefits, on the one hand, and a right of action for damages, unseaworthiness, maintenance, cure and wages, on the other. The Public Vessels Act, in granting jurisdiction of libels "for damages caused by a public vessel", did not impliedly create a new right of action in public vessel crew members who already enjoyed a right to compensation and related benefits. The distinction be-

tween jurisdiction and a right of action is fundamental and the grant of jurisdiction does not imply the creation of a right of action.

Prior to the Public Vessels Act, jurisdiction for suits for unseaworthiness, maintenance, cure and wages was available under the Tucker Act of 1887, since such claims rest upon the implied contract of the Government as ship operator, but no such suits had ever been brought, presumably because compensation was exclusive and no such right of action existed. Nothing in the history or purpose of the Public Vessels Act indicates an intention to create such a right of action.

The language of the Federal Employees' Compensation Act of 1916 and in particular its detailed provisions respecting the right of election of its beneficiaries between compensation and paid sick and annual leave, retirement annuities and other benefits, shows that Congress intended compensation to be exclusive, except as provided in that Act. Although jurisdiction existed under the Tucker Act for suits for unseaworthiness, maintenance, cure and wages, no such suits had been brought before 1916 and Congress appears not to have regarded any such right of action as existing in favor of public vessel crew members.

Implying a new right of action in addition to a right to compensation would have five consequences which Congress would not seem to have intended. *First,* a right of election would be unworkable in the absence of express statutory provision, because

crew members, as wards of the admiralty, are often not held to an election. *Second,* to imply a right of election would be inconsistent with the established rule respecting compensation statutes that, except where election is provided for, compensation is always exclusive. *Third,* election would discriminate unfairly against merchant seamen who are expressly denied compensation and have as their exclusive recovery their right of action against their employer. *Fourth,* election would discriminate unfairly against members of the military component of the crew of public vessels who are confined to their disability compensation and pension rights for all service-incident injury, sickness, or death. *Fifth,* election to proceed by suit might in some instances, such as the *Mandel* case, No. 414, result in judicial interference with military responsibility, requiring the Government to litigate the question of the due care of a military commander in the presence of the enemy.

The plain language of the two statutes, their history, and the consequences of the right of election advocated by petitioners, show that Congress, in not making any provision as to election between the right to compensation and a right of action, intended compensation to be exclusive.

IV

By the Federal Employees' Compensation Act Amendments of 1949, Congress left for final resolution by this Court the pre-existing conflict of

decisions regarding the exclusiveness of compensation. Four circuits have now held compensation to be exclusive in the case of a federal employee eligible to compensation. The Second and Third Circuits have done so in the present cases involving public vessel crew members. Two other Circuits have so held with respect to shoreside employees. *Lewis* v. *United States,* 190 F. 2d 22 (C.A. D.C.), certiorari denied, 342 U.S. 869; *Posey* v. *Tennessee Valley Authority,* 93 F. 2d 726 (C.A. 5). Only the Fourth Circuit is in square conflict. *United States* v. *Marine,* 155 F. 2d 456; *Johnson* v. *United States,* 186 F. 2d 120.

At the time the 1949 amendments were proposed four seamen's cases had considered the question of the exclusiveness of compensation, paid leave, and retirement benefits pursuant to the Federal Employees' Compensation Act. Two of the cases had held it exclusive. *O'Neal* v. *United States,* 11 F. 2d 869 (E.D. N.Y.), affirmed, 11 F. 2d 871 (C.A. 2); *Lopez* v. *United States,* 59 F. Supp. 831 (S.D. N.Y.). The Second Circuit, by *dicta* in cases involving members of the regular military component of the crew of public vessels, had approved these holdings. The District Court below in the *Mandel* case had held benefits under the Federal Employees Compensation Act were not exclusive. The Ninth Circuit had agreed with the Government that there was jurisdiction but had not reached the question of exclusiveness.

The purpose of the declaratory amendment to section 7 of the Compensation Act (5 U.S.C., Supp. IV, 757) making it clear that the right to compensation benefits is exclusive was to resolve the conflict in the decisions. After the bill had passed the House and was favorably reported in the Senate, the seamen's unions became fearful that it might deprive them of some rights. Senator Morse offered a floor amendment, preserving the *status quo*. The total effect of his amendment, as he himself stated, was to "make clear that no provision of this amending act, as distinguished from the existing Compensation Act itself, shall be construed to affect any maritime rights or remedies of seamen" (95 Cong. Rec. 13608). He further explained that the amendment made special provision for late filing of claims for compensation if suits were dismissed among other reasons "because the remedy under the Compensation Act is exclusive" (95 Cong. Rec. 13609).

Senator Douglas, who was in charge of the bill, accepted the Morse floor amendment subject to a statement in which he emphasized that because no hearings had been held on the point the *status quo* was being preserved. He said, "we are not seeking to legislate affirmatively as to certain claims and denials of a right of election of remedies under existing laws, which claims and denials have not yet been adjudicated by the Supreme Court" (95 Cong. Rec. 13609).

This judicial and legislative history of the question shows that Congress has left the determination of the effect of the original Compensation Act of 1916 to this Court.

ARGUMENT

Introductory

The Government does not question that injured Government employees, whether in military or civil service, can bring suits against the United States under the Tort Claims, Public Vessels, or Suits in Admiralty Acts if they have a cause of action for damages for their injuries.[6] The sole question is whether there is such a right of action or whether federal employees' compensation, when available, is exclusive. The general problem is, as the court below observed in the *Mandel* case, "May an injured person who is eligible to compensation claim additional rights against the United States? If so, we assume an action to enforce them could be maintained * * *" (MR. 103). Or as this Court observed in *Feres* v. *United States* (340 U.S. 135, 140-141), with respect to the Tort Claims Act: such acts confer "jurisdiction to render judgment upon all such claims. But it does not say that all claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as matter of law as much as to

[6] The Tort Claims Act contains certain specific exceptions and limitations (see 28 U.S.C. 2680) which are not expressly applicable to the two admiralty statutes. Cf. *infra*, p. 76.

adjudge that liability exists. [By virtue of the Act,] Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law."

The issue in this type of case is, generally, whether a person who admittedly has a right to receive compensation and related benefits from the United States also has a right of action against the Government for sickness, injury, or death in the performance of duty—a right of action which may be asserted by suit under whichever of the various jurisdictional statutes is otherwise applicable. This problem is not confined to members of the civil-service component of the crews of armed forces vessels, even though they are the principal group now affected. For the future, the problem has been definitely solved as to the mass of federal employees by the 1949 amendments to the Federal Employees' Compensation Act (Act of October 14, 1949, c. 691, 63 Stat. 854), in which Congress announced in express terms the exclusiveness of compensation under that Act (*infra*, pp. 100-102). But at the same time Congress left to the courts whether the amendment was purely declaratory or altered the pre-existing law. It left for ultimate judicial decision and expressly excluded from the effect of the 1949 declaration, *first*, all cases of every kind which had been previously instituted,

second, all cases involving masters and members of crews of vessels;[6a] and, *third,* all cases involving members of the United States Park Police and the members of the military services were left for consideration by the courts since the compensation statutes applicable to those persons, like the Federal Employees' Compensation Act prior to the October 14, 1949 amendments, contain no express declaration as to whether the right to compensation is exclusive. See *Feres* v. *United States,* 340 U.S. 135 (compensation exclusive for military personnel); *Lewis* v. *United States,* 190 F. 2d 22 (C.A. D.C.), certiorari denied, 342 U.S. 869, rehearing denied, 342 U.S. 899 (compensation exclusive for United States Park Police). Thus, the problem is of somewhat wider scope than the particular situations directly involved in the two cases now at bar. The dominant considerations, however, stem from the circumstances in cases like the two before the Court, involving civil service members of mixed crews on military transport vessels which may frequently be employed in warlike operations.

[6a] The 1949 amendments declared that the subsection providing in terms for the exclusiveness of compensation "shall not apply to a master or a member of the crew of any vessel." See *infra,* p. 100. In addition to civil service crew-members of military transports, a few civil service employees of other agencies such as the Coast and Geodetic Survey and the Army Engineers are affected. Moreover, employees of the Fish and Wildlife Service, the Immigration and Naturalization Service, and of numerous other agencies which operate patrol and inspection launches and similar craft, equally become, during that part of their service which is

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The Public Vessel Crew-Members Here Involved Are Entitled to Federal Employees' Compensation and Related Benefits and Have a Different Status from Federally-Employed Merchant Seamen Who Are Excluded from Such Compensation and Whose Right of Action under the Suits in Admiralty Act Is Their Sole Remedy for Injury, Sickness, or Death

Much of the argument of both petitioners is founded on the contention that members of the civil service component of the crews of military transport vessels are merchant seamen, the same as the crew-members of merchant vessels of the War Shipping Administration (WSA), its predecessor the Shipping Board, and its present successor the National Shipping Authority (NSA). In fact, however, the merchant seamen on those vessels have never enjoyed the same rights under the federal disability compensation, paid sick and annual leave, civil service retirement acts, and related statutes which crew members of public vessels enjoy. The exclusive right of such merchant seamen for injury, illness, or death in the service of the ship is by suit for damages, maintenance and cure against their employer. They have been expressly excluded from the benefits of the Federal Employees' Compensation Act and related benefits. While this exclusion has since 1943 been

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aboard such public vessels, masters or members of crews, although during most of their service they are shoreside employees.

effected by statute, it was formerly the rule by administrative and judicial decision (see *infra*, pp. 32-35).

Other aspects of petitioners' arguments appear grounded on the related erroneous assumptions *first*, that although Congress made separate provision for the two classes of ships in the Suits in Admiralty and Public Vessels Acts, there is no difference between public vessels of the United States and government merchant vessels so long as the members of the crew of public vessels are not all in the military service and, *second*, that military transport vessels, vessels of the Coast and Geodetic Survey, of the Fish and Wildlife Service, and of the Army Engineers are no different from government owned merchant vessels engaged in the carriage of commercial cargo.

We submit that all of petitioners' elaborate citation of cases and argument, based upon the right of merchant seamen on such WSA/NSA merchant vessels to recover damages, or maintenance and cure, by suit against the United States under the Suits in Admiralty Act, is footless. It establishes no more than the familiar and conceded fact that such merchant seamen must of necessity recover in that way since, unlike crew-members of public vessels (whether in civil or military service), recovery by suit is the exclusive remedy of such merchant seamen and they would otherwise be without recovery.

But, in addition to this basic difference, the distinctions between merchant vessels and merchant seamen, on the one hand, and public vessels and their regular civil and military service crews, on the other, are too fundamental to be overlooked. Because the two cases now before the Court involve crew-members of military transport vessels and because such vessels and their crews are the most numerous and the nature and scope of their rights the most important, we shall use such vessels and their crews to illustrate the relevant differences between public vessels and government merchant ships.

1. The vessels of the Army Transport Service (now succeeded by the Military Sea Transportation Service of the Navy), whether hospital ships (*Lopez* v. *United States*, 59 F. Supp. 831 (S.D. N.Y.)), troop transports (No. 401, *Johansen*), or tug boats (No. 414, *Mandel*), are not merchant vessels but are auxiliaries to the fleet and are operated for the military function of transporting troops and their supplies in forward areas.[7] The operation of these vessels is an integral part of military operations both peacetime and warlike. They have crews consisting of both military and

[7] The carriage of civilian government employees, of dependents of military and civil service personnel, and of evacuees, together with the personal and household effects of such persons, is a secondary activity. When undertaken, it is solely in furtherance of the Government's interest, not for profit, and only when space would not be used for military purposes.

civil service components. Thus, on Army hospital ships, the deck and engine room force are civil service employees but the medical crew are in the military service.

The status of both the military and the civil service components of the crews of these vessels is similar; their rights and discipline are similar, except that the civilians are free to quit at the end of any voyage. The civil service public vessel crew-members, no less than their fellow crew-members of the military component, are subject to military law. "It is unthinkable that Congress did not mean to include persons in the United States Army Transport Service, engaged in transporting our armies and sustaining them with equipment and supplies." *Ex parte Falls,* 251 Fed. 415, 416 (D. N.J.); *Ex parte Gerlach,* 247 Fed. 616 (S.D. N.Y.). Disobedience of orders is an offense which, since unhesitating obedience is vital, may possibly be punished by death. See former Articles of War 64 and 65 (10 U.S.C. 1536, 1537); Articles 90, 91 of the Uniform Code of Military Justice (50 U.S.C., Supp. IV, 684, 685). Disrespect to a superior is an offense, even though no disobedience is involved. Former AW 63, AW 65 (10 U.S.C. 1535, 1537); Articles 89, 91 of the Uniform Code (50 U.S.C., Supp. IV, 683, 685). Still other provisions furnish the military with full authority to deal with negligent conduct. Former Article of War 96 (10 U.S.C. 1568) provided *inter alia* that "disorders and neglects to the preju-

dice of good order and military discipline, [and] all conduct of a nature to bring discredit upon military service" are offenses for which, as already explained, the civil service as well as the military components of the vessel's crew might be punished. Article 134 of the new Uniform Code of Military Justice (50 U.S.C., Supp. IV, 728) is to the same effect.

No question may be allowed as to the right of command and the duty of obedience. It is for that reason that the military authorities have absolute power of control, enforced by rigorous sanctions, over the civil service crew-members no less than those of the military component. Allowing access to the courts by suit to recover for injuries sustained by armed forces seamen in the execution of military orders would tend to shift this regulation and control from the military establishment to the courts, which would be required in the course of personal injury litigation to pass upon the propriety of military decisions and actions. Essential military descipline abroad transports, hospital ships, and tugs would be impaired by thus subjecting the military command to publice criticism and scrutiny at the behest of members of the civil service component of the crew.

Moreover, military transports travel into combat zones in time of war and frequently are in the presence of the enemy, as in the *Mandel* case, No. 414. So far as military security is concerned, the situation is precisely the same where vessels of

the armed forces are involved, regardless of whether the injury or death is that of a member of the civil service or of the military service component of the crew. Were suit to be allowed in cases such as *Mandel*, the United States might feel compelled, as in that case, to permit a default judgment to be entered against itself rather than to make disclosures inimical to the national security. (Cf. MR. 64-65.)

2. The civil service members of the crews of such Army and Navy vessels plainly have a different status from the merchant seamen on private vessels and the government-employed merchant seamen on vessels of the former WSA and its successor the NSA. Unlike WSA/NSA merchant seamen, such civil service crew-members on Army and Navy vessels are regular civil service employees of the United States taking the regular oath of office as public officers of the United States and enjoying not only the benefits of compensation but of paid sick and annual leave, cumulative from year to year, and full civil service retirement benefits. They are not employed by the voyage like private or WSA/NSA merchant seamen, but under long term contracts, permanent agreements of enrollment, or continuous shipping articles, for as many voyages as their vessel may make, subject to yearly renewal or termination.

3. For many years, there have existed decided differences between the attitudes of merchant sea-

men and public vessels seamen toward compensation legislation. For instance, private merchant seamen, at the time of the enactment of the federal Longshoremen's and Harborworkers' Compensation Act, wished to be excluded from that act no less than from the state compensation acts and to have their exclusive recovery by suit against their private employers.[8] Civil service crewmembers on Army and Navy vessels, on the other hand, had enjoyed the benefits of the Federal Employees' Compensation Act since 1916 and nothing in the discussions leading up to enactment of the Longshoremen's Act evidenced any desire of armed forces seamen to relinquish this protection which they enjoyed as federal employees.[9]

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[8] At the time of the adoption of the Longshoremen's Act the attorneys for the private seamen notified the committee that they preferred the Jones Act remedy. See Senate Committee on the Judiciary, Hearings on S. 3170, 69th Cong., 1st Sess., p. 17. At first the bill covered them. H. Rep. No. 1767, 69th Cong., 2d Sess. But they were later excluded, 68 Cong. Rec. 5402-5403, 5908.

In 1940-1941, in connection with the consideration of the Shipowners' Liability Convention of 1936, 54 Stat. 1693, the same course of events was repeated. Senate Committee on Commerce, Hearings on H. R. 6881, 76th Cong., 3d Sess. On September 12, 1940, the Senate agreed to a Resolution referring the question of workmen's compensation for privately employed seamen to the interested Government agencies for investigation. S. Res. 299, 76th Cong., 3d Sess.; 86 Cong. Rec. 12002. The agencies' report was transmitted to the Senate on September 17, 1941, and referred to the Committee on Commerce. S. Doc. 113, 77th Cong., 1st Sess.; 87 Cong. Rec. 7434. The change was vehemently opposed by the seamen's representatives and no further action was taken.

[9] The reasons for this difference in the attitude of the merchant seamen, on the one hand, and the public vessel seamen,

II

The Clarification Act of 1943 Was Based on the Assumption That Merchant Seamen on War Shipping Administration Vessels, Like Private Merchant Seamen, Should Have Their Exclusive Rights by Suit Against Their Employer, While Public Vessel Crew Members Should Have Federal Compensation Benefits Exclusively.

We believe that Congress, from at least 1943, was aware of the distinction between the nature and rights of merchant seamen such as those employed by the War Shipping Administration, on the one hand, and public vessel seamen of the Army and Navy, on the other. It was this awareness which led

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on the other, are not far to seek. *First*, while the compensation payments under both the Federal Employees' Compensation Act and the Longshoremen's Act have been increased, the benefits under the FECA have always been more liberal. At the present time, the injured harborworker's compensation is only two-thirds of his pay, but not to exceed in any case more than $35 per week (33 U.S.C., Supp. IV, 908, 906), but the civil service employee's compensation may amount to as much as $525 per month and is increased from two-thirds to three-fourths of his pay if he has dependents (5 U.S.C., Supp: IV, 754, 756). In case of death the advantage for a civil service employee is still greater. Under the FECA a wife receives 45 percent of the decedent's pay, a wife and one child 55 percent, and additional children 15 percent each, but not to exceed in all three-fourths of the decedent's pay or $525 per month (5 U.S.C., Supp. IV, 760). The widow of a privately-employed worker, on the other hand, receives only 35 percent of the decedent's wages taken at not to exceed $52.50 and each child 15 percent additional, but not to exceed in all the comparatively insignificant sum of two-thirds of $52.50 or a total of $35 per week (33 U.S.C. Supp. IV, 909).

Second, the Federal Employees' Compensation Act (contrary to petitioner Mandel, Br. 27-29), unlike the Harborworkers' Act, does not contain the litigiously prolific phrase "arising out of and in the course of employment." The FECA says only "sustained while in the performance of his duty" (5 U.S.C. 751). Since everything a crew-member does in the

to the enactment of the Clarification Act of 1943,[10] which confirmed in WSA merchant seamen the exclusive right of suit against their employer, the United States, which private merchant seamen enjoyed against their private employers, and left public vessel seamen to their compensation, paid sick and annual leave, retirement, and other civil service rights.

1. Before World War II, the prevailing administrative and judicial view was that Government merchant seamen were excluded from federal employees' compensation and had their exclusive

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service of the ship is in the performance of his duty (*Aguilar* v. *Standard Oil Co.*, 318 U.S. 724; *Warren* v. *United States*, 340 U.S. 523) the way is open for the broadest relief. See *infra*, pp. 43-44.

Third, compensation under the FECA (again contrary to petitioner Mandel, Br. 30-31) is a very great deal more than maintenance. Compensation like maintenance is paid for injury or illness in the service of the ship, regardless of fault or negligence. Unlike maintenance, compensation is payable even though the seaman is hospitalized and receiving full maintenance in kind. Compensation under the FECA is only limited by a statutory maximum of $525 per month (5 U.S.C., Supp. IV, 756(c)) and not, like maintenance, to the reasonable value of the seaman's quarters and subsistence. Since August 1948, the usual rate on maintenance under union agreements has risen to a maximum of $6.00 per day or $42.00 per week. Before August 1948, maintenance was still lower, usually only $4.50 per day. We are unaware of any awards against the United States (in WSA/NSA cases) at higher than $6. (Cf. petitioner Mandel, Br. 10, 30). In *Allen* v. *United States*, 1951 A.M.C. 1316 (S.D. Calif.), a crew-member of an Army Transport, who contracted tuberculosis in the service of the ship, was receiving compensation under the FECA at the rate of $89.71 per week. At $6 his maintenance would be $42. Compensation, depending on wages, might amount to as much as $121 per week.

[10] War Shipping Administration (Clarification) Act, March 24, 1943, 57 Stat. 45, 50 U.S.C. App. 1291.

rights by suit under the Suits in Admiralty Act.[11] Members of the crew of merchant vessels, whether privately operated or operated by the Maritime Administration and its predecessor and subsidiary organizations, the Shipping Board, the various Fleet Corporations, WSA and the present NSA, have always been excluded from compensation benefits. By contrast, public vessel crew members had had, since 1916 (when the Federal Employees' Compensation Act was passed), their exclusive rights under the Compensation Act and related legislation. See *infra*, pp. 42 *et seq.* When large-scale operation of merchant ship by WSA began in 1942, the question arose whether the mer-

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[11] The Attorney General had first held such merchant seamen not entitled to compensation (34 Ops. A.G. 120). Later he reversed himself (34 Ops. A.G. 363). The Comptroller General, however, ignored the change and continued to hold the right to sue under the Suits in Admiralty Act excluded the right to compensation. After this Court's decision in *Johnson* v. *Fleet Corp.*, 280 U.S. 320, he reaffirmed his view, citing that case and declaring (Decision A-31684, September 10, 1930): "While the Employees' Compensation Act was not mentioned nor considered, the conclusion seems justified that the remedy available to a member of a crew of a merchant vessel owned by the United States and operated by or for the Merchant Fleet Corporation, to recover for injury sustained during employment, is, also, exclusive of any right or remedy under the Employees' Compensation Act. * * * Accordingly, in view of the latest rulings of the Supreme Court of the United States, above cited, the form of agreement for operation of ships, and the specific provisions contained in the annual appropriation acts for the purchase of all forms of insurance by the Merchant Fleet Corporation, it is only reasonable to conclude that, under existing law, the Employees' Compensation Commission may not entertain, settle, or pay any claims under the Employees' Compensation Act by or on

chant seamen employed on such vessels would continue to have their sole rights under the Suits in Admiralty Act or whether they would be treated as public vessels crew members.

Fully aware of the difference in rights, Congress deliberately chose to affirm the rights of WSA seamen under the Suits in Admiralty Act, and to prohibit them from receiving compensation. Congress took this action because it was thought undesirable to assimilate the rights of the large number of merchant seamen (temporarily in government service in order to man the cargo vessels supporting the war effort) to those of the Army Transport and other public vessels seamen who were regular government employees under the Federal Employees'

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behalf of members of the crews of vessels owned or operated by the United States Shipping Board Merchant Fleet Corporation, or the beneficiaries of such who die as a result of such injuries sustained in the course of their employment on such vessels."

Some of the cases involving the exercise by such merchant seamen of their exclusive right of recovery by suit are collected by petitioner Mandel (Br. 14), a smaller number are collected in *Gibbs* v. *United States*, 94 F. Supp. 586, 589, fn. 9 (N.D. Calif.), and are referred to in the Third Circuit's *Mandel* opinion (fn. 15, MR. 108). The insurance carriers on the government's merchant vessels were permitted to offer their crew-members voluntary settlement on the scale of the compensation benefits to which they would have been entitled if employed on Army and Navy vessels. See e.g. *Hillenbrand* v. *United States*, 1929 A.M.C. 885 (S.D. N.Y.); *Stewart* v. *United States*, 25 F. 2d 869 (E.D. La.). This was in full accord with the similar voluntary practice of insurance carriers on private commercial vessels. See e.g. *Bay State Dredging & Contracting Co.* v. *Porter*, 153 F. 2d 827 (C.A. 1); *In re Panama Transport Co.*, 98 F. Supp. 114, 117 (S.D. N.Y.).

Compensation and Civil Service Retirement Acts.[12] In explaining to Congress the situation which induced WSA to ask for this legislation, its General Counsel stated:[13]

> As private employees, seamen are entitled to the protection of the old-age benefit provision of the Social Security System; they and their dependents may recover damages for injury or death of seamen through the provisions of the Jones Act, they are protected by other remedies and they have certain rights with respect to allocations of wages. When the same seamen work on vessels which are bareboated or owned by the War Shipping Administration they become Government employees and these rights, which union labor has learned to prize very highly, either cease to exist or are substantially impaired. In exchange for such lost privileges, these seamen acquire special privileges of Government employees such as right to compensation for injury under the United

[12] In February and March 1942, when War Shipping Administration was created and proceeded to requisition the American merchant fleet and inaugurate its plan for direct government operation, the entire merchant fleet was privately operated, employing some 55,000 seamen. Ninety percent of the 1,375 ocean-going vessels were privately owned. Ten percent were government-owned but were demised by the Maritime Commission for private operation. Less than 50 comparable public vessels, plus a few tugs and harbor craft, were operated by the Army Transport Service with civilian crews. On V-J day in August 1945, there were over 220,000 seamen manning some 4,300 vessels which remained of the 5,200 ships built by the Maritime Commission plus the original 1,375.

[13] House Merchant Marine and Fisheries Committee, 77th Cong., 2d Sess., Hearings on H. R. 7424 (Sept. 2, 1942), p. 14.

States Compensation Act, a questionable right to retirement benefits and other rights peculiar to Government employees.

Seamen constantly interchange between time chartered vessels on which they are private employees, and bareboated or owned vessels on which the personnel becomes employees of the Government. The rights of seamen may thus change from voyage to voyage depending upon the particular status of the vessel upon which they happen to sail. In view of the interchangeability of seamen, this creates many administrative difficulties. Moreover, it seems to us that since the interval of Government operation represents but a temporary phase of the history of the merchant marine, it would be best to maintain the status of seamen as private employees with respect to such matters.

In the course of the consideration of the Clarification Act, it was emphasized again and again that merchant seamen employed on Government cargo vessels would have, exclusively, the ordinary merchant seamen's rights against the United States *under the Suits in Admiralty Act*. But seamen employed on vessels engaged solely as *public vessels*, and not within the Suits in Admiralty Act, would have their exclusive right to receive compensation payments.[14] It was to prevent any possibility of WSA merchant seamen being assimilated to public

[14] See S. Rep. 62, 78th Cong., 1st Sess., p. 5; H. Rep. 107, 78th Cong., 1st Sess., pp. 16, 34; S. Rep. 1813, 77th Cong., 2d Sess., p. 23; S. Rep. 1655, 77th Cong., 2d Sess., p. 19; H. Rep. 2572, 77th Cong., 2d Sess., p. 9.

vessel seamen like those of the armed services (whose compensation rights were recognized as exclusive), that the legislation was deemed necessary.

The general understanding in and out of Congress was plainly that the exclusive right of civil service crew-members of armed forces vessels was compensation, and that WSA merchant seamen were being fairly dealt with when they were given, in exchange for the public vessel seamen's right of compensation, the same right of recovery by suit, but without compensation, which had always been the exclusive right of private merchant seamen. This understanding was emphasized in the letter of the Chairman of the Compensation Commission commenting on the Clarification bill. It stated:[15]

> It is the Commission's understanding of the proposed legislation that its application is to be limited to seamen employed by or on behalf of the War Shipping Administration, and that the rights heretofore long enjoyed by seamen in other Federal services, who have acquired status as civil employees of the United States, will not be disturbed or affected. In this connection it may be pointed out that in services such as the Army Transport Service, seamen have been employed directly as civil employees of the United States and for many years have received the protection of the Federal Employees' Compensation Act.

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[15] House Merchant Marine and Fisheries Committee, 77th Cong., 2d Sess., Hearings on H. R. 7424 (Sept. 2, 1942), p. 6; H. Rep. 107, 78th Cong., 1st Sess., p. 34.

As to seamen in the Army Transport Service, it should be noted that the protection afforded by the Federal Employees' Compensation Act is far greater than that contemplated for seamen by the bill, H. R. 7424. The bill apparently would merely provide a basis for recovery of damages for injury or death only in the very limited class of cases where the employer was negligent. Negligence of the employer or contributory negligence or fault of the employee is not a factor in determining the payment of workmen's compensation benefits, and employees and dependents receive the same protection in all injury or death cases, whether or not the employer was at fault.

2. This legislative history thus confirms, as the Second Circuit recognized in *Bradey* v. *United States*, 151 F. 2d 742, 743, certiorari denied, 326 U.S. 795, that Congress intended compensation to provide both the military and civil service crewmembers of armed forces vessels with their exclusive right, and such seamen were not to be given a right of action against the United States for the negligence of their military superiors and fellow crew-members. Had this not been so, the Clarification Act would have been unnecessary, for WSA seamen would have had a right of action against the United States even though they were considered public vessel crew-members (as it was feared they would be), and there would have been no need whatever to pass legislation granting or confirming a right to sue.

Indeed, when World War II began it was already the law of two circuits (and no conflict existed) that suits for death and injury could be brought under the Public Vessels Act in accordance with its literal language. *Dobson* v. *United States* 27 F. 2d 807, 808 (C.A. 2), certiorari denied, 278 U.S. 653; *New England Maritime Co.* v. *United States*, 55 F. 2d 674, 685 (D. Mass.), affirmed *per curiam, sub. nom. United States* v. *Gould*, 73 F. 2d 1016 (C.A. 1). Thus there was no question as to the existence of jurisdiction. It was only because of the belief, in Congress and elsewhere, that while jurisdiction might exist under the Public Vessels Act, the right to compensation benefits was exclusive of any right of action for damages, or for maintenance and cure, on the part of public vessel crew-members, that legislation was necessary at all.

Moreover, if injured civil service seamen of armed forces and other public vessels had both the right to compensation and the right of action for damages, and for maintenance and cure, as petitioners argue, it is difficult to believe that Congress in the Clarification Act would have discriminated against WSA crew-members by giving them only a right of recovery by means of suit and depriving them of the right to compensation. The purpose of the Clarification Act was certainly not to restrict the rights of the merchant seamen to whom it applied.

Conversely, for Congress to have given the WSA merchant seamen both the rights of armed forces seamen under the Compensation Act and the rights of private merchant seamen to recovery by suit would have been a capricious discrimination. It would have been unjust against the private merchant seaman, who had only the right to sue their employers but no right to compensation benefits, against the military service component of the crews of armed forces vessels, who had only the right to disability and death compensation benefits but no right of action for recovery by suit, as well as against the civil service component of public vessel crews, who were, as Congress believed, limited like the military component to compensation and related benefits. The 1943 Congress accordingly never for a moment considered that course.

The consequence of petitioners' contention that no distinction should be drawn between merchant seamen and public vessel crew-members thus involves the adoption of that same unjustifiable discrimination in the silence of Congress. It gives civil service crew-members of armed forces vessels all the rights of both the military service and the merchant service groups. We submit that the Congress which passed the Clarification Act could never have intended thus to place the civil service component of the crews of public vessels in a position so far superior to both merchant seamen and to the military service component of the crew of the same public vessel.

III

Construing the Public Vessels Act and the Federal Employees' Compensation Act Together So as to Make a Workable, Consistent, and Equitable Whole Shows That Compensation and Related Benefits Were Intended to Be Exclusive for Service-Incident Injury, Sickness, and Death of Public Vessels Crew Members

That the Congress which passed the Clarification Act in 1943 did not err in its appraisal of the rights of public vessel crew-members is shown by a detailed consideration of the statutory scheme applicable to such seamen.

The problem is to determine the intention of Congress in providing government employees with two different statutory remedies against their employer. In the present cases the two different remedies are the Public Vessels Act of 1925 (43 Stat. 1112; 46 U.S.C. 781 *et seq.*) and the Federal Employees, Compensation Act of 1916 (39 Stat. 742, 5 U.S.C. 751 *et seq.*[16] Once again, as this Court observed in *Feres v. United States,* 340 U.S. 135, 138, "There are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind. Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy."

[16] As we have seen, *supra*, pp. 23-24, in other contexts the statutes will vary; for example in the case of Park Police, substituting the Tort Claims Act and the Police and Firemen's Relief Act.

Where injury, sickness, or death is not incident to the employee's service, it is obvious that the exclusive remedy is under the Public Vessels Act, or under the Tort Claims Act or the Suits in Admiralty Act, if the other circumstances render one of the latter acts rather than the Public Vessels Act the appropriate remedy. This is so because the Federal Employees' Compensation Act, unlike the corresponding statutes relating to military service employees, is limited to cases of injury, sickness, and death in the performance of duty. Everything in the service of the ship is in the performance of duty where crew-members are involved. *Aguilar v. Standard Oil Co.*, 318 U.S. 724; *Warren v. United States*, 340 U.S. 523. Thus the coverage of the Federal Employees' Compensation Act, which extends to all injury, sickness or death "sustained in the performance of his duty" (5 U.S.C. 751), and is not limited to those "arising out of and in the course of employment" (cf. 33 U.S.C. 902), is extremely broad in the case of crew-members. But there are, none the less, rare occasions when public vessel seamen of the civil, no less than those of the military, service may still be injured while they are not in the performance of duty. In such cases the Compensation Act does not apply and their remedy under the Public Vessels, Tort Claims, and Suits in Admiralty Acts is of necessity exclusive. There remains, however, the mass of cases, like those now at bar, where the Compensation Act applies because the employee was in

the performance of duty and yet jurisdiction for suit exists under the language of the Public Vessels Act. It is the solution of such cases where two remedies are available which is the concern of this Point.

Of a similar situation involving the existence of two remedies, the *Feres* case stated (340 U.S., at 144): "We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other; or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy. There is as much statutory authority for one as for another of these conclusions." But it was also said of such situations (at 139) that "This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." In so doing, as was said in *Brooks* v. *United States,* 337 U.S. 49, 52, "Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose."

We turn therefore to the examination of petitioner's two statutory remedies, with a view to seeing how they may best be harmonized. We will look first at the Public Vessels Act of 1925, then at the Federal Employees' Compensation Act of

1916. We will examine the consequences of the construction for which petitioners are contending and finally take some note of the judicial decisions which have dealt with the problem.

A. *The Public Vessels Act, in granting general jurisdiction over suits against the Government for injury, sickness, and death, did not impliedly create a new cause of action for damages, maintenance and cure for service-incident injury, sickness, and death.*

The language of the Public Vessels Act of 1925 provides broadly for jurisdiction of all libels in admiralty "for damages caused by a public vessel of the United States" (46 U.S.C. 781). No exceptions of suits by government personnel are made. The pattern is the same as in the Tucker Act of 1887, which granted jurisdiction of all claims founded "upon any contract, express or implied * * * or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable" (24 Stat. 505). Jurisdiction was granted by the 1925 Act for suits in tort against the Government by its civil and military personnel seeking damages for injury, sickness or death, where previously jurisdiction for suits had been restricted by the Tucker Act to claims for wages, maintenance and cure, and indemnity for breach of the implied

contract to furnish a seaworthy vessel—all of which sound essentially in contract as implied undertakings of the shipowner.[17]

The only difference in the statutes lies in the omission from the Public Vessels Act of the phrase in the Tucker Act restricting suit to claims "in respect of which claims the party would be entitled to redress * * * if the United States were suable." (This omission, as we shall point out, was clearly not intended by Congress to alter the effect of the jurisdictional grant or to create new rights of action.) There can thus be no question but that Congress in the Public Vessels Act, exactly as in the Tort Claims and Suits in Admiralty Acts, has given a judicial remedy to all government employees of the civil and military service as well as to all other persons. Indeed, were tort suits by civil service employees to be excluded from such jurisdictional acts, they would be remediless for any injury, sickness, or death which was not incident to their service and so would fall outside the Compensation Act. Moreover, the jurisdictional remedy of necessity extends equally to employees' cases arising in the performance of their duties. Were this not so, the courts could not validly

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[17] *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724, 730; *The Osceola*, 189 U.S. 158. Because the Public Vessels Act (like the Suits in Admiralty Act) is exclusive of the Tucker Act, Public Vessels Act jurisdiction, where available, has now replaced that of the Tucker Act where suits for wages, maintenance, cure and unseaworthiness are involved. *United States* v. *Loyola*, 161 F. 2d 126 (C.A. 9); *Thomason* v. *United States*, 184 F. 2d 105 (C.A. 9).

determine whether the case arose in the performance of the employee's duty, so as to decide the essential question of whether there is a cause of action for the injury, sickness or death involved.

But this Court has pointed out, "The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury" (*Chelentis* v. *Luckenbach SS Co.*, 247 U.S. 372, 384). This essential distinction between the existence of a judicial remedy and the possession of a right of action on which recovery may be had was emphasized in *Feres*, where the Court said (340 U.S. at 140): "This [language] confers jurisdiction to render judgment upon all such claims. But it does not say that all claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as matter of law as much as to adjudge that liability exists * * * it remains for courts, in the exercise of their jurisdiction, to determine whether any claim is recognizable in law."

Indeed, it is familiar and long settled that Congress by providing a judicial remedy by suit against the United States does not thereby create, or impliedly recognize as already existing, a right of action which can be enforced under the new jurisdiction. It was well said in *Kuhnert* v. *United States*, 127 F. 2d 824, 826 (C.A. 8), "We think that no court would be justified in interpreting an act of Congress as creating a new cause of action

against, or imposing a new liability upon, the United States unless the language of the act was clearly susceptible of no other reasonable construction." See also *Atchley* v. *Tennessee Valley Authority*, 69 F. Supp. 952, 954 (N.D. Ala.).

We turn therefore to the consideration of whether anything in the legislative history of the Public Vessels Act, including the omission from the 1925 Act of the Tucker Act's restriction to cases where "the party would be entitled to redress * * * if the United States were suable," shows that Congress gave government personnel a right of action for damages, maintenance and cure for injury, sickness, or death in the performance of duty when they already had a right to compensation, paid leave, and related benefits under the compensation statutes.

The legislative history of the Public Vessels Act is quickly summarized. The Suits in Admiralty Act applies only where the vessel involved is "employed as a merchant vessel" (46 U.S.C. 742). It did not apply to Army or Navy vessels nor to the various small craft operated by other government agencies. It was sought to bring damage by such public vessels within the jurisdiction of the courts. On May 29, 1924, Congressman Underhill introduced H. R. 9535, 68th Cong., 1st Sess., which became the Public Vessels Act without change so far as concerns the provision pertinent here. At that time there were already pending two other

bills, H. R. 6989 and H. R. 9075, both of which would also have authorized suit in case of damage by a public vessel. H. R. 6989, likewise introduced by Mr. Underhill, was the successor of a series of bills introduced at each session of Congress after the enactment of the Suits in Admiralty Act in 1920. It provided for suit "for collisions caused by * * * public vessels," and had the approval of all interested Government departments. H. R. 9075, a new measure, was designed to revise the Suits in Admiralty Act and, at the same time, to remove its existing limitation to those vessels operated by the Government as merchant vessels. H. R. 9075 had the powerful support of the Maritime Law Association of the United States, but it equally had the strenuous opposition of the interested departments. They were extremely apprehensive of danger if public vessels were placed on the same footing as merchant vessels. They were insisting on many and important changes.[18]

Protracted delays were apparent if an attempt were made to rewrite H. R. 9075 so as to meet these governmental objections. Instead of proceeding further with either H. R. 6989 or H. R. 9075, Mr. Underhill, for the Judiciary Committee, introduced a new bill, H. R. 9535, which was to become

[18] House Judiciary Committee, 68th Cong., 1st Sess., Hearing on H. R. 9075 (May 21, 1924). The Maritime Law Association and the interested departments had taken substantially similar positions on a previous bill of similar import. See Hearings on H. R. 13591, 66th Cong., 3d Sess. (February 2, 1921).

the Public Vessels Act as we know it. H. R. 9535, in place of limiting its grant of jurisdiction to suits "for collisions caused by * * * public vessels," extended it to all suits "for damage caused by * * * public vessels." The purpose of this change is nowhere discussed. Statements in the reports and in the course of the debates indicate that only relief from property damage may have been clearly in mind and may have been all that was specifically intended. See 66 Cong. Rec. 2087; S. Rep. 941, 68th Cong., 2d Sess., p. 1; cf. *American Stevedores* v. *Porello*, 330 U.S. 446.

At no time was any discussion had of the omission from the bills of language similar to that in the Tucker Act, restricting suit to cases where the claimant "would be entitled to redress * * * if the United States were suable." No discussion was had as to the bills' possible application to claims for injury, sickness or death, or what effect the new grant of jurisdiction would have on the rights of civil and military service crew-members of public vessels who had no rights under the Suits in Admiralty Act and who had previously sought no relief by suit under the Tucker Act for wages, maintenance, cure and unseaworthiness, but had been content with their compensation and related rights.

The chief emphasis in the debates was placed on the burden imposed on Congress and the delays to the litigants resulting from private relief bill

legislation. Thus Congressman Underhill, in charge of the bill, declared, "I think there is no justification for the method by which claims against the Government are settled today. There is no justice in it. There is no equity in it. It is one of the worst conditions that exist in the Government today"[19] (66 Cong. Rec. 2087). So Senator Bayard, in charge of the bill in the upper chamber, emphasized that at the preceding Congress nearly 200 private bills granting relief for damage by maritime accidents had been introduced. The bill, Senator Robinson pointed out, "would relieve Congress of the consideration of a great many measures in the nature of private claims" (66 Cong. Rec. 3560). This, too, was the emphasis of the committee reports which included lists of the recent private relief acts which had been passed and seem to argue that the bill was an act for the relief of Congress as much as of claimants.[19]

None of the lists of claims found in the reports and nothing in their texts referred to claims by members of either the civil or military service components of the crews of public vessels. Without exception, these lists were concerned with damages to ships, piers, drydocks and marine railways.[20] Never at any time in the course of the debates in the House or Senate was it suggested that the bill

[19] S. Rep. 941, 68th Cong., 2d Sess., pp. 4, 10, 17; cf. H. Rep. 1301, 66th Cong., 3d Sess., pp. 4, 5.

[20] See fn. 19, *supra*.

could also have the effect of giving a right of action against the United States for death or injury of public vessel crew-members in the performance of duty or would alter the law under which their compensation and pension rights had theretofore been regarded as exclusive. It seems obvious that Congress intended to make no change in respect of the rights of public vessel seamen and was wholly unaware that the problem could be involved. This was only natural, of course, because "Congress was suffering from no plague of private bills" on behalf of either the civil or the military components of the crew of public vessels "because a comprehensive system of relief had been authorized for them and their dependents by statute." See *Feres* v. *United States*, 340 U.S. 135, 140.

It seems fairly certain, moreover, that the defense departments would not have permitted the new bill to go unchallenged if it had been intended to give crew-members of armed services vessels—whether in civilian or military service—the right to bring suit for the negligence of their military superiors or fellow crew-members in the performance of duties which ordinarily are intimately connected with matters of a military character. Yet nothing was said by the representatives of the defense departments or the Department of Justice in their letters or statements at the hearings concerning any possibility that the bill would permit recovery for death or injury in the performance

of duty by either military or civil service crewmembers of armed forces vessels. Just as with the omission of Congress to discuss the point, this was equally natural because, although the Tucker Act had conferred jurisdiction in 1887 of suits for unseaworthiness, maintenance and cure, no such suits had ever been brought.

We conclude, therefore, that Congress did not intend by granting broad jurisdiction of claims "for damages caused by a public vessel" to create or recognize any new right of action for damages, unseaworthiness, maintenance and cure, resulting from service-incident death, illness, or injury of members of either the civil or military service components of public vessel crews. We think Congress was aware of the fundamental distinction between granting jurisdiction and creating a right of action. It discussed only the extent of the jurisdiction conferred by the bills that became the Public Vessels Act because it did not regard itself as legislating on the subject of substantive rights of action.[21]

B. *The Federal Employees' Compensation Act of 1916 created a compulsory and exclusive right to compensation in place of any other liability of the United States.*

1. When originally enacted in 1916, and so far as relevant when the cases now before this Court

[21] For the lower court cases brought under the Public Vessels Act by persons eligible for compensation, see *infra*, pp. 80 *et seq.*

arose, the full text of the pertinent sections of the Federal Employees' Compensation Act of September 7, 1916, c. 458, 39 Stat. 742, provided:

> [Sec. 1] That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty * * *
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> Sec. 7. That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States.

The Act thus emphasized in Section 1 that the United States "*shall pay* compensation for disability and death." Compensation is made absolutely mandatory on both sides. No election is given the employee in accepting nor is there any choice by the Government about paying. The Act further emphasized in Section 7 that, except for earned wages and military pensions, the liability of the United States for compensation should be exclusive of "any other kind of remuneration whatsoever."

In respect of other rights of compensation or benefits payable by the United States, express pro-

vision for election was made. Section 8 of the Act (5 U.S.C. 758) required the employee to elect between his right of compensation and his right to paid sick or annual leave. The Civil Service Retirement Act of 1920 and its successive amendments have similarly provided for election between the benefits of the compensation and the retirement acts (5 U.S.C. 714). Similar provisions were made when persons in the reserve of the various military services and in the Public Health Service were permitted to elect the benefits of the Compensation Act in place of the various special disability retirement and pension legislation.[22] Finally, a generalized provision for these types of election was made by the Public Health Service Act of July 1, 1944, c. 373, 58 Stat. 712 (5 U.S.C. 757 (a), first proviso). At no time, however, either in the original or any subsequent act, was provision made for election between the Compensation Act (or any similar act) and any possible right of action against the United States for unseaworthiness, maintenance, cure and wages under the Tucker Act or for damages under any tort jurisdiction statute, including the Public Vessels Act.

On the other hand, express provision was made from the beginning in respect of tort claims against parties "other than the United States," including the Panama Railroad Co., a New York corpora-

[22] See e.g., 5 U.S.C. 797, 10 U.S.C. 1711; 14 U.S.C. 311-312, 386; 34 U.S.C. 855c, 857e; 50 U.S.C. 1552.

tion of which the United States was stockholder. Sections 26 and 27 (5 U.S.C. 776, 777) provided in lieu of subrogation that such claims should be assigned to the United States or should be prosecuted by the beneficiary under the direction and for the benefit of the Government. With respect to cases involving the Panama Railroad Co. it was provided that the claim should be either assigned to the United States or released to the Railroad (5 U.S.C. 791).[23]

Thus, while the original 1916 draftsmen and its later amenders may not have so written the Act as to anticipate every future contention that the grant of a jurisdictional remedy against the United States impliedly recognized or created new rights of action and imposed new liabilities (in favor of public vessel crew-members or others), we believe that the Act is plainly grounded on the assumption that compensation was to be exclusive of all other rights against the United States for injury or death in the performance of duty. This is confirmed by the circumstances prevailing at the time of its enactment and its subsequent history.

2. Before the Federal Employees' Compensation Act of 1916, no general compensation law

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[23] As was said in *Panama RR Co.* v. *Minnix*, 282 Fed. 47, 49 (C.A. 5): "While the United States is the sole stockholder of that corporation, the corporate entity of that company is maintained, and the railroad is operated by the corporation. The employees are recognized by the act itself as being those of that corporation. It took an express provision of the Compensation Act to extend its benefits to them."

existed for the civil (as contrasted with the military) service crew-members of public vessels nor for civil employees as a class. The prior Acts of May 30, 1908, c. 236, 35 Stat. 556, and March 11, 1912, c. 57, 37 Stat. 74, applied to only certain workers in navy yards, arsenals, construction projects, and a few other occupations deemed especially hazardous. The hearings and committee reports on the bill which became the 1916 Act constantly emphasize the absence of any right of recovery for other government workers against their employer except by means of the tremendous flood of private relief bills. As with the later Public Vessels and Tort Claims Acts, heavy emphasis was placed upon the importance of relieving Congress of this burden of private legislation.[24]

In 1916, there was neither jurisdiction nor a right of action in tort for public vessel crew-members or other government employees seeking to recover against the United States. Moreover, if there had been jurisdiction they would probably have been barred either by the fellow servant rule or the rule that the ship operator is not liable for the negligence of the master and crew. *Pacific SS Co.* v. *Peterson*, 278 U.S. 130, 134; *Carlisle Packing Co.* v.

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[24] 64th Cong., 1st Sess., House Judiciary Committee, Hearings on H. R. 15316 (esp. pp. 5, 11) and H. Rep. 678, esp. p. 8). Other reports and documents relating to the compensation bills are H. Doc. 1135, 63d Cong., 2d Sess.; H. Rep. 561, 63d Cong., 2d Sess.; S. Rep. 733, 64th Cong., 1st Sess.; H. Rep. 1195, 64th Cong., 1st Sess. The appendix of the Congressional Record is full of accounts of the delays of private bill relief.

Sandanger, 259 U.S. 255, 258; *Chelentis* v. *Luckenbach SS Co.*, 247 U.S. 372, 382; *The Osceola*, 189 U.S. 158, 175. But, on the other hand, there would seem to have been no lack of a jurisdictional remedy under the Tucker Act for suits by civil service crew-members for wages, maintenance, cure and unseaworthiness. After 1887, the Tucker Act, as we have already seen (*supra*, p. 45), granted jurisdiction of claims founded "upon any contract, express or implied * * * or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable" (24 Stat. 505). Nonetheless, although there would seem to be no doubt that claims for wages, maintenance, cure and unseaworthiness rest upon the implied contract of the ship-operator on which suit could be brought in admiralty,[25] no civil service crew-member appears to have attempted to bring such a suit against the United States. We can only infer that it was the general belief in 1916 that civil service crew-members of public vessels, unlike private seamen, were regarded as having no such right of action against their employer.

3. This Court early indicated the view that the Compensation Act was exclusive, by dicta in *Dahn* v. *Davis*, 258 U.S. 421, affirming *Hines* v. *Dahn*, 267

[25] See *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724, 730; *The Osceola*, 189 U.S. 158; *United States* v. *Loyola*, 161 F. 2d 126 (C.A. 9).

Fed. 105 (C.A. 8). There the Court quoted the provisions of the Compensation Act and stated that while there were two *remedies* between which the injured employee might elect and could pursue only one to satisfaction, the sole *right of recovery* was under the Compensation Act. Referring to section 7, the Court pointed out (p. 429) that, "It would be difficult to frame a clearer declaration than this that no payment would be made by the Government for injuries received other than as provided in the act." It construed the language of the whole act as evidencing (p. 430) "the disposition to treat the compensation provided for as adequate for the injuries received" and negativing the existence of any other rights against the United States.

Petitioners appear to contend that this reference by the Court to the indisputable fact that there were two *remedies* means that the Court intended to hold that there were also two *rights of recovery* for injury, sickness, or death of a government employee, between which two recoveries the claimant has an unrestricted choice. But such a reading of opinion conflicts with the Court's dicta to the effect that compensation benefits were to be the sole payments by the United States. Although the opinion is not explicit throughout, we believe that the Court did not employ the word "remedies" rather than "rights" by inadvertence and did not intend to ignore the distinction between rights and remedies or to hold without discussion that contrary to the

Court's statement regarding section 7, payments for injuries would be made otherwise than as provided in the Act. The case required the Court to go no further than to decide that, having pursued the compensation remedy to an adjudicated award, the claimant could not also pursue the other judicial remedy even to the extent of asking the courts to determine whether there was a right of action for the injury and death as well as a right to compensation. While the Court did not cite any case or refer to the fundamental distinction, we submit that in stating that claimants had an election of *remedies,* the Court nonetheless had clearly in mind the distinction that "A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury." *Chelentis* v. *Luckenbach SS Co.*, 274 U.S. 372, 384. We believe that careful examination of the case bears this out.

In *Dahn's* case, as in the cases now at bar, compensation had first been collected. A railway mail clerk employed by the Post Office Department was injured in the performance of duty by the negligence of the Illinois Central Railroad Company (while under federal control in World War I). His widow obtained an award under the Federal Employees' Compensation Act. In accordance with Sections 26 and 27 of the Act (5 U.S.C. 776, 777), suit was then brought, pursuant to the directions of the Compensation Commission, against the railroad and the Director General of Railroads.

Although the Government was thus a party in interest with both the claimant and the defendant, the plaintiff contended that by virtue of Section 10 of the Federal (Railroad) Control Act of March 21, 1918, c. 25, 40 Stat. 451, no defense was to be made by the Director on the ground that the railroad was an agency of the Government. Plaintiff argued that the Control Act made the Director a third party tort-feasor, the same as a private carrier for purposes of Sections 26 and 27.

The Eighth Circuit rejected this contention. It held, however, that although she had two remedies —one judicial, the other administrative—plaintiff was precluded from recovery because (like petitioners in the cases now at bar) she had claimed compensation and the administrative claim was allowed.[26]

On certiorari, this Court agreed that while plaintiff had two *remedies,* one by suit and one by claim for compensation (258 U.S. at 428), she was precluded from the exercise of her judicial remedy as a result of her having claimed compensation. This Court's decision as to preclusion was rested upon the double ground (258 U.S. at 432) of, *first,* "the distinct expression of purpose on the part of Congress which we have found in the Compensation Act, to treat the payments under it as sufficient and final" and, *second,* "because the petitioner elected to pursue to payment the remedy given him there-

[26] Cf. *Payne* v. *Cohlmeyer,* 275 Fed. 803 (C.A. 7) (U.S. deputy marshal); *Midway Nat. Bank & Trust Co.* v. *Davis,* 288 Mo. 563 (employee of same railroad).

under." In commenting on Section 7, which provides that while in receipt of compensation a Federal employee shall not receive any other "remuneration from the United States," the Court quoted the language of Section 7 and concluded (p. 429):

> It would be difficult to frame a clearer declaration than this that no payment would be made by the Government for injuries received other than as provided for in the act.

And in commenting upon Sections 26 and 27, respecting election in suits against third party tort feasors, the Court further observed (p. 430):

> Plainly, by these two sections Congress deals with the liability of persons *"other than the United States"* to employees entitled to compensation under the act, not for the purpose of increasing that compensation, but for the purpose of reimbursing the Government for payments made and of indemnifying it against other amounts payable in the future. *The sections emphasize the disposition to treat the compensation provided for as adequate for the injuries received, and they negative any intention on the part of the Government to make further payments.* [Last emphasis supplied.]

This Court thus recognized that, read as a whole, the fair meaning of the Act is that although claimants have two *remedies*, and may elect which one to exercise, the remedy by suit will produce no recov-

ery because the Compensation Act provides that no payment will be made by the Government for service-incident injury, sickness, and death, except as provided in the Act.

Brady v. *Roosevelt SS. Co.*, 317 U.S. 575, is to the same effect. There a customs inspector was injured in the performance of duty by the negligence of Roosevelt SS. Co., an agent operating a vessel for the Government under a demise operating agreement. His widow obtained an award under the Federal Employees Compensation Act and, as in *Dahn* v. *Davis, supra,* in accordance with Sections 26 and 27 of the Act, suit was brought under direction of the Compensation Commission against the Government's agent. The Court of Appeals for the Second Circuit (128 F. 2d 169) held that plaintiff's right to sue the United States under the Suits in Admiralty Act was exclusive of any right against the agent. On certiorari, the agent, and the Solicitor General appearing as *amicus,* contended that plaintiff's exclusive judicial remedy was under the Suits in Admiralty Act and, compensation having been collected, *Dahn* v. *Davis* precluded such a suit. This Court stated (*id.*, p. 577) "We agree with the court below that this was a maritime tort over which the admiralty court has jurisdiction * * *. And we may assume that petitioner could have sued either the United States or the Commission under the Suits in Admiralty Act. * * * The sole question here is whether the Suits in Admiralty Act

makes private operators such as respondent nonsuable for their torts." The Court held that eligibility for and receipt of compensation barred suit against the United States, citing *Dahn* v. *Davis* (p. 581); but declared "He may however sue 'some person other than the United States'; and in case of recovery the amount is credited on the amount of compensation payable to him," citing 5 U.S.C. 777. The Court held the operating agent was such a person.[27]

In only one other case has a court examined the actual text of the Compensation Act, instead of assuming that the omission of a separate clause respecting exclusiveness left the statute ambiguous on the point.[28] In *Feres* v. *United States,* 177 F. 2d 535, 537, affirmed, 340 U.S. 135, the Second Circuit, in explaining the final omission from the Tort Claims Act of any exception for claims covered by the Federal Employees' Compensation Act, after referring to Section 7 (5 U.S.C. 757) (discussed by this Court in the *Dahn* case (*supra,* pp. 59, 62)), stated "it would seem that the explanation for the omission of the thirteenth exception to the Tort Claims Act is that it was considered unnecessary."

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[27] In *Brooks* v. *United States,* 337 U.S. 49, 53, the Court, by way of dictum, stated that the Federal Employees Compensation Act provided for an election of remedies. Inasmuch as the only election provided by the Act in so far as the United States is concerned is between compensation and other statutory benefits, it would seem to have little significance where as here the sole question is the exclusiveness of the right of compensation. Cf. *Feres* v. *United States,* 340 U.S. 135, 144.

[28] For other lower court cases see *infra,* pp. 78 *et seq.*

The Compensation Act of itself was exclusive.[29]

In the light of the foregoing review of the language of the Compensation Act and related statutes, and the decisions in the *Dahn* and *Feres* cases, we submit that (a) the circumstances surrounding the enactment of the Public Vessels Act show no reason for Congress to anticipate that the grant of a judicial remedy by that Act "for damages caused by a public vessel" would imply the creation of a new right of action for damages, maintenance and cure in the civil service component of public vessel crews, and (b) the Compensation Act made its benefits exclusive for persons within its coverage. Having examined the language and history of the statutes creating the two remedies, we now pass to the consideration of the consequences of petitioners' contention that there are not only two remedies but also two rights of recovery for service-incident injury, sickness and death.

C. *Implying a right of action for damages, maintenance and cure would lead to consequences which in the silence of Congress should not be presumed to have been intended*

This Court in *Brooks* v. *United States*, 337 U.S. 49, 52, said that the construction of statutes giving

[29] Were this not the case, the insertion in the Tort Claims Act of a special exception would have served as a ground for the contention that its absence from the Public Vessels Act (and the Tucker Act) indicated that public vessel seamen of both the civil and military components had a right of action on which recovery could be had.

remedies against the Government should take account of the consequences of the various readings as an aid to the determination of the Congressional purpose. In *Feres* v. *United States*, 340 U.S. 135, 139, it was further stated that such statutes should be construed together so that the entire system of remedies against the United States would "make a workable, consistent and equitable whole." These tests cannot be met by petitioners' contention that crew-members of public vessels have been granted both the right to compensation, paid sick and annual leave, retirement and related benefits, which is exclusive for other civil and military employees, and also the right of action for damages, unseaworthiness, maintenance, cure and wages, which is exclusive for merchant seamen. The consequences of petitioners' reading of the statute would plainly be unworkable, inconsistent, and inequitable. Five such consequences appear to justify particular attention.

1. *Election in the absence of explicit statutory provision is unworkable.*—The insolvable confusion which would result in view of the failure of the draftsmen of the various statutes to provide how to deal with double recovery or election constitutes a most significant consequence of treating the Public Vessels Act as having created or recognized a right of action for damages, unseaworthiness, maintenance, cure and wages on the part of the civil service component of public

vessels of the Army and Navy. As this Court said of the same problem in the *Feres* v. *United States* (340 U.S. 135, 144): "If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service." We believe that the identity of the problem presented, whether the compensation benefits are under the civil or the military service statutes, indicates that an identical intention would have existed on the part of Congress in respect of civil and military service employees alike.

The necessity for reaching an identical conclusion, whether civil or military service personnel is involved, is reenforced by the right of military reservists on temporary active duty to elect between benefits under the military compensation statutes and the usually more favorable Federal Employees' Compensation Act benefits.[30] Under petitioners' view the rule of the *Feres* case might be entirely avoided in such circumstances. If the widow of a member of the military component of

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[30] See Sec. 7 (5 U.S.C. 757), proviso to para. (a), as added by Act of July 1, 1944, c. 373, 58 Stat. 712, and the various statutory provisions cited in footnote 22, *supra*, p. 55; cf. *O'Neal* v. *United States*, 11 F. 2d 869 (E.D. N.Y.), affirmed, 11 F. 2d 871 (C.A. 2).

the crew elects the smaller military benefits[31], she is confined to them by *Feres,* but if petitioner's view of the Federal Employees' Compensation Act prevails and she elects benefits under that Act, she may first obtain an award and then, having made her election not to take military benefits, can reject the F.E.C.A. payments and recover for wrongful death by suit under the Public Vessels Act.

The detailed provisions made by Congress in the original Compensation Act of 1916, coupled with its failure to make any corresponding provision in respect of a right of recovery under the Tucker Act or the Public Vessels Act, strongly suggests the Congressional understanding that the rights of compensation, paid leave, and retirement are exclusive, and there is no "election". The dispositive character of this absence of statutory direction for double recovery or "election" between the right to compensation and a right of action for damages, which the Court emphasized in *Feres* v. *United States* (340 U.S. at 144), is fully

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[31] A wife and one child is entitled to $78 in the event of the service-incident death of a soldier regardless of rank (38 C.F.R. 1946 Supp. § 35.06, p. 5913). In addition the widow receives the six months death gratuity according to the pay of the decedent's grade. Act of December 17, 1919, as amended (41 Stat. 367, 57 Stat. 599, 10 U.S.C. 903). The widow of a reservist on active duty, however, may elect benefits under the Federal Employees' Compensation Act. Under the F.E.C.A. a wife and one child receive 55 percent of decedent's pay taken at not less than $150 per month. In the *Mandel* case, No. 414, the benefits for the widow and child would be $226.41 per month.

demonstrated when the cases trying to apply the "election" rule are examined.

Where crew-members are involved, the problem is complicated by their enjoyment of special seamen's privileges as wards of the admiralty judges. Thus, it has been held that even collection of cash compensation benefits by a seaman does not preclude him from recovery by suit. *Johnson* v. *United States*, 186 F. 2d 120 (C.A. 4); *Bay State Dredging & Contracting Co.* v. *Porter*, 153 F. 2d 827 (C.A. 1); *Gahagan Construction Corp.* v. *Armaco*, 165 F. 2d 301 (C.A. 1); cf. *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239; *Muruaga* v. *United States*, 172 F. 2d 318 (C.A. 2); *Dice* v. *Akron, C. & Y. R. R. Co.*, No. 374, decided February 4, 1952. Relying on the rule of the *Dahn* case, 258 U.S. 421 (*supra*, pp. 58-63), however, the district court in the *Johansen* case (JR. 11-12) and some other district courts have held the contrary: *Wright* v. *United States*, 95 F. Supp. 77 (N.D. Calif.); *Frader* v. *United States*, 91 F. Supp. 657 (S.D. N.Y.).[32]

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[32] Where shoreside employees are involved, the general rule is as stated in 71 Corpus Juris, p. 1488: "An election to take compensation under the statute, as evidenced by bringing proceedings to secure compensation, even though compensation is denied, or the right thereto is disputed, or by accepting compensation or medical services * * * bars an action to recover damages." Thus in *Hines* v. *Dahn*, 267 Fed. 105, 114 (C.A. 8), affirmed, *sub nom. Dahn* v. *Davis*, 258 U.S. 421, it was stated that the making of the award even without its collection precluded suit. This appears to stem from the fact that where the United States is concerned, mere delivery of a check is a binding payment without cashing it. See *Beers* v. *Federal Security Administrator*, 80 F. Supp. 183 (D. Conn.), affirmed, 172 F. 2d 34 (C.A. 2); *Anthony P. Miller, Inc.* v. *Commissioner*, 164 F. 2d 268, 269 (C.A. 3): "it is most common to speak of

State courts similarly hold that when a claim for compensation is adjudicated under state compensation acts, the award acts as *res judicata* and estops the claimant from refusing the payment and bringing suit. *Nyland* v. *Northern Packing Co.*, 56 N.D. 624; *Sotonyi* v. *Detroit City Gas Co.*, 251 Mich. 393.[33] Even acceptance of medical and burial benefits is held to constitute an election. *Gibbs* v. *United States*, 94 F. Supp. 586 (N.D. Calif.); *Ocasio* v. *United States*, 99 F. Supp. 601 (D. Puerto Rico); *Mains* v. *J. E. Harris Co.*, 119 W. Va. 730; *Hlas* v. *Quaker Oats Co.*, 211 Iowa 348; *Talge Mahogany Co.* v. *Burrows*, 191 Ind. 167.[34]

We submit that this divergence of views in the lower courts shows the difficulties which would be the consequence of treating the matter as one of "election." It shows the unlikelihood of Congress, having had any intention of creating a cause of action. It confirms that the only workable solution

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'paying' an obligation by giving one's check for it." Delivery fully perfected the election made in filing claim. Where the Government is concerned no question of collectibility can be involved and the Government's promise in the check differs in no respect from its promise in its regular paper currency.

[33] The filing of claim for compensation is an election and under the rule of exhaustion of administrative remedies requires that any pending suit be stayed or dismissed. *Simas* v. *Dugan*, 116 Atl. 755 (R.I.).

[34] In the latter case the court said (191 Ind. at 188): "It is not the law that a person who has done an act with full knowledge of all material facts can avoid the consequences annexed by law to such act by alleging and testifying that when he did it he was not advised that the law gave him a choice between that course and a different one, and that he afterward learned what the law was and chose the different course."

of the problem here, as in the *Feres* case, is to hold that compensation is exclusive. As the Court said in *Dahn* v. *Davis, supra*, the statutes evidence a Congressional disposition "to treat the compensation provided for as adequate for the injuries received, and they negative any intention on the part of the Government to make further payments" (258 U.S. at 430).

2. *Election in the absence of explicit statutory provision is inconsistent with other compensation acts.*—It is inconsistent with all other compensation acts to imply a right of election in the silence of Congress. Only the compensation statutes of Great Britain and New Hampshire allow a general right of election and both make explicit, detailed provisions concerning it.[35] Both this Court in the *Feres* case (340 U.S. at 143) and the court below in the *Mandel* case (MR. 104), gave controlling weight to the familiar rule that, unless the statute is by its terms elective, the rights provided are exclusive, so far as the employer is concerned, whenever the statute is applicable. See Schneider, *Workmen's Compensation Law*, (1941) §§ 89-154, esp. § 147, p. 421; Prosser, *Torts*, (1941) p. 543; 71 Corp. Jur. p. 1480.

The absence of any express legislative direction for double recovery or election thus seems compelling that the rights provided by the Act were expected to be exclusive for service-incident injury,

[35] 15 and 16 Geo. V, c. 84, § 29(1); N.H. Pub. Laws c. 178, § 11.

sickness, and death. Where not incident to service the opposite rule, of course, prevails and a right of action exists. Cf. *Brooks* v. *United States,* 337 U.S. 49. In the latter situations, there is not only jurisdiction for suit under the Tort Claims, Public Vessels, or Suits in Admiralty Acts, as may be appropriate, but recovery in such suits is plaintiff's exclusive right if he is a civil service employee (see, *supra,* p. 43). Such a construction is particularly necessary to produce a consistent and equitable whole of the congressional enactments, in view of the much more favorable benefits enjoyed by civil service crew-members on public vessels.

3. *Election by public vessel crew-members would discriminate inequitably against merchant seamen.* —The unjust and inequitable discrimination against merchant seamen, both private and those of the WSA/NSA, resulting from implying a right of election where public vessel seamen are involved, was relied upon by both courts below (JR. 16-17; MR. 105, fn. 13).

The careful consideration by Congress of the vastly different rights of merchant seamen and public vessel seamen, at the time of the adoption of the Clarification Act (see *supra,* pp. 32-41), weighs heavily against the implication that in making recovery by suit against their employer (the United States the exclusive rights of WSA seamen, Congress meant without any reason to discriminate,

against them. On the contrary, the careful consideration of Congress, followed by its decision not to change the rights of regular public vessel seamen, but to give WSA seamen the same exclusive right of recovery by unit as merchant seamen, was to confirm each class in its preexisting rights. Cf. *Bradey* v. *United States*, 151 F. 2d 742, 743 (C.A. 2), certiorari denied, 326 U.S. 795.[36]

Congress could not have contemplated that the civil service component of the crews of public vessels should enjoy at once both the right to disability and death benefits, exclusive in the case of their fellow crew-members of the military component, and the right of recovery by suit, exclusive in the case of merchant seamen. The discrimination against the other groups is too glaring.

4. *Election by the civil service component of Army and Navy vessels would discriminate inequitably against their fellow crew-members.*—The doctrine adopted by this Court in *Feres* (340 U.S. 135) that the disability compensation and pension laws applicable to military personnel were the equiva-

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[36] There the court said: "Congress did not expect those in its service upon public vessels to enjoy at once the privilege of employees' compensation and the right to recover damages for the same injuries. The compensation provided for the Navy is indeed not the same as that provided under the United States Employees Compensation Act, 5 U.S.C.A. 751 *et seq.*; but that makes no difference. We are to assume that each is deemed adequate for the occasion; particularly since it is certain, and does not depend upon proof of fault. We conclude that Congress regards the two remedies as mutually exclusive. * * *"

lent of benefits under the Federal Employees' Compensation originated from the refusal to discriminate against beneficiaries of that Act and in favor of military personnel. The first case was *Haselden* v. *United States*, 24 F. 2d 529 (E.D. N.Y.), affirmed *sub nom. Dobson* v. *United States*, 27 F. 2d 807 (C.A. 2), certiorari denied, 278 U.S. 653, involving the claim of a Navy rating on a public vessel. There the district court expressly relied on the fact that, while the Federal Employees' Compensation Act did not apply, the same "well-established policy of the government is shown in the pension laws" (at p. 530). The converse of the rule appears equally applicable.

Members of the civil and military components of military transport crews are exposed to essentially similar risks. *Supra*, pp. 27-30. It is now established that when military personnel suffer injury, illness, or death in the performance of routine peacetime duty—such as living in barracks which are negligently maintained or being subject to negligent operations and treatment by military doctors and hospitals or being negligently injured in a collision with another vessel while on training—they have no right of action on which suit can be maintained under the appropriate jurisdictional act. By reason of the decisions in *Feres* v. *United States*, 340 U.S. 135; *Bradey* v. *United States*, 151 F. 2d 742 (C.A. 2), certiorari denied, 326 U.S. 795, and *Dobson* v. *United States*,

27 F. 2d 807 (C.A. 2), certiorari denied, 278 U.S. 653, crew members of the military component have compensation and related benefits as their exclusive right.

The unlikelihood that Congress intended a different rule for their fellow crew-members of the civil service component, injured while engaged in equally routine peacetime military operations, is especially marked when it is remembered that the benefits under the Federal Employees' Compensation Act are many times more liberal than those paid under either the harbor-workers are the military compensation statutes.[37]

5. *Election to recover by suit might sometimes lead to judicial intrusion into military operations.* —The possibility of judicial intrusion in certain cases into the realm of responsibility in military affairs may also afford a reason for believing that Congress would not have created a cause of action

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[37] See fn. 9, *supra*, p. 32. A wife and one child is entitled to $78 per month in the event of the death of a soldier in service. For each additional child the widow is entitled to $15 per month (38 C.F.R. 1946 Supp. 35.06, p. 5913). In addition she receives the six months' death gratuity according to the pay of the decedent's grade. Act of December 17, 1919, as amended (41 Stat. 367, 57 Stat. 599, 10 U.S.C. 903). Under the Federal Employees' Compensation Act a wife with one child receives 55 percent of the decedent's pay, taken at not less than $150 per month. For each additional child 15 percent of the decedent's pay is added, but total compensation may not exceed $525 per month. In the *Mandel* case, No. 414, the decedent's pay and allowances for compensation purposes was $411.66 per month and the benefits for his wife and child would amount to $226.41 per month. The widows of his shipmates in the military service receive only about one third as much.

for service-incident injury, sickness, and death without first hearing the representatives of the defense departments and then dealing with the matter in express terms.

The matter is of some particular importance in No. 414, the *Mandel* case. It has, however, already been sufficiently adverted to above (pp. 29-30), is discussed in some detail by the Third Circuit (MR. 105-106), and is referred to by the Second Circuit in No. 401, the *Johansen* case (JR. 16, 17). Petitioners insist on the undoubted fact that such cases will probably be few in number compared to the total of service-incident injuries, sickness, and deaths (esp. Mandel Br. 11, 32-34).

It would seem a sufficient answer to petitioners that the same contention was made in *Feres* v. *United States,* 340 U.S. 135, where the Tort Claims Act, unlike the Public Vessels Act, contains an express exception for "combatant activities" and occurrences in "a foreign country" (28 U.S.C. 2680), so that the number of instances should be even smaller. This Court, however, found the line to be drawn and the bases of distinction to rest upon whether the injury, illness, or death was incident to service and not on whether it occurred during a "warlike operation" rather than in routine peacetime duty in barracks or hospital or training manoeuvers. We believe this consequence has at least the same validity here as in cases involving suits by military employees under the Tort Claims Act.

This view of the language and history of the Public Vessels Act and the Federal Employees' Compensation Act and of the consequences of treating the Acts as having given petitioners a right of action, as well as a right to compensation, shows that in the absence of express statutory direction by Congress petitioners' compensation rights were exclusive. We will examine next the history of the 1949 amendments to the Compensation Act to ascertain if they were intended to work any change.

IV

By the Compensation Act Amendments of 1949 Congress Left for Final Resolution by the Courts the Pre-Existing Conflict of Decision as to Whether Public Vessel Crew Members and Other Regular Civil Service Employees Who Enjoy Compensation and Related Benefits Also Have a Right of Action for Service-Incident Injury, Sickness, or Death

Petitioners apparently do not deny that the 1949 compensation amendments did not change the law relating to the civil service component of public vessel crews or grant them an express right of election.[38] But petitioners argue that the amendments show a Congressional recognition that the courts had previously established that public vessel crew members have such an election (*Johansen* Br. 12; *Mandel* Br. 15, 19). Since the impetus for the

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[38] The 1949 amendments expressly provided for the exclusiveness of compensation but declared that this new subsection (as distinct from the rest of the Act) "shall not apply to the master or a member of the crew of any vessel." *Infra*, p. 100. The lower courts have expressly declared that these amendments did not change the law in respect of exclusiveness (JR. 11; MR. 103, fn. 8).

provision in the original 1949 bill expressly making compensation exclusive was a desire to resolve the conflict of the lower courts without the necessity of resorting to this Court, petitioners would appear to be in error. Indeed, the contrary appears to be established by the absence of any representation by the defense departments at the hearings on the original bill or in connection with the last minute addition, by floor amendment, of the proviso excepting crew members of armed forces vessels from the new "exclusiveness" provision. As congressional recognition of a right of election would have the serious consequences for the Army and Navy Departments which we have discussed above (*supra*, pp. 27-30, 75-76), it is certain that the defense departments would not have allowed the matter of granting to military transport crew members an election of recovery by suit to have proceeded without their active participation and resistance.

In order that the actual purpose and effect of the 1949 amendments may be fully understood, we believe that the prior state of judicial consideration of the question and the legislative history of the Senate floor amendment, excepting crew members from the new explicit exclusiveness provisions, should be examined in detail.

A. *The Conflicting Cases Prior to the 1949 Amendments*

In addition to the two Courts of Appeals below,

two other Courts of Appeals have squarely held that, in the absence of any express Congressional direction for double recovery or election, compensation, paid leave and retirement benefits under the appropriate statutes are exclusive. *Posey* v. *Tennessee Valley Authority*, 93 F. 2d 726 (C.A. 5); *Lewis* v. *United States*, 190 F. 2d (C.A. D.C.), certiorari denied, 342 U.S. 869. One Court of Appeals has expressly held the contrary. *United States* v. *Marine*, 155 F. 2d 456 (C.A. 4); *Johnson* v. *United States*, 186 F. 2d 120 (C.A. 4). Two other Courts of Appeals, while holding, correctly in our view, that the courts have jurisdiction of suits by such compensation beneficiaries,[39] did not reach the question of exclusiveness because they found the plaintiffs had no right of action in any event. *United States* v. *Loyola*, 161 F. 2d 126 (C.A. 9); *Parr* v. *United States*, 172 F. 2d 462 (C.A. 10).[40]

The decisions relating to exclusiveness which existed at the time of the 1949 amendments may be divided into three periods. (1) Prior to the enactment of the Public Vessels Act of 1925 no suits were brought by public vessel seamen, although, as we have already noted (*supra*, pp. 45, 53), jurisdiction of suits for unseaworthiness, maintenance,

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[39] Cf. *Brady* v. *Roosevelt SS Co.*, 317 U.S. 575, 577: "we may assume that petitioner could have sued either the United States or the Commission under the Suits in Admiralty Act."

[40] The opinion in the *Parr* case (at p. 464) indicates the court thought the Fourth Circuit view to be correct. The Tenth Circuit took the same view of service-incident injuries of military personnel. *Griggs* v. *United States*, 178 F. 2d 1, reversed *sub nom. Feres* v. *United States*, 340 U.S. 135.

cure and wages undoubtedly existed under the Tucker Act of 1887 (24 Stat. 505). (2) After this Court's statement about Section 7 of the Federal Employees' Compensation Act in *Dahn* v. *Davis*, 258 U.S. 421, 429 (1922), that "It would be difficult to ~~furnish~~ a clearer declaration than this that no payment would be made by the Government for injuries received other than as provided for in the Act" until the *Marine* case (1946) and the district court decision in the *Mandel* case (1947), compensation was uniformly held to be exclusive. (3) From the *Marine* case until the enactment of the 1949 amendments, the tendency was reversed and a right of action in addition to a right to compensation, paid leave and retirement benefits was recognized. The course of decision had thus been anything but consistent throughout the three periods, and the question was thus the very opposite of having been settled by 1941 (cf. Johanson Br. 6; Mandel Br. 15).

The earliest case to deal with the question under the Federal Employees' Compensation Act was decided in 1925, *O'Neal* v. *United States*, 11 F. 2d 869 (E.D. N.Y.), affirmed, 11 F. 2d 871 (C.A. 2). A crew member of a Coast Guard vessel covered by the Federal Employees' Compensation Act was injured in the performance of duty. Almost as soon as the Public Vessels Act was enacted he brought suit thereunder. The district court dismissed. Without sharply distinguishing between the

court's jurisdiction over a suit "for damages caused by a public vessel" and the libelant's right of action, the opinion applied the rule, later announced by this Court, of construing the different remedies together "to make a workable, consistent and equitable whole". (*Feres* v. *United States,* 340 U.S. 135, 139). To allow recovery the court said "would be contrary to the well-established policy of the government, which has created the United States Employees' Compensation Commission to meet such conditions, and provided for the payment of compensation to its injured employees." Congress by providing jurisdiction "did not intend to overturn the government's established policy and permit its employees to bring actions for damages received on government ships in the course of their employment." The Second Circuit affirmed without opinion (11 F. 2d 871).

The next case involving a civil service crew member of a military vessel was *Lopez* v. *United States,* 59 F. Supp. 831 (S.D. N.Y.), decided in 1944. There, as in the cases now before this Court, suit was filed by a member of the civil service component of a military transport—the Army Hospital Ship *Seminole.* The United States answered denying that libelant had a right of action on the ground that libelant's right to compensation was exclusive. On exceptions, the answer was held good, Judge Coxe declaring that if the Government proved libelant was an employee of the Army Transporta-

tion Corps and not a ~~United States Army~~ merchant seaman, libelant's compensation right was exclusive. No appeal was taken, but, meanwhile, the Second Circuit announced, by considered dicta in cases involving public vessel crew members in military service (*Dobson* and *Bradey, infra*), its entire approval of the view that the Federal Employees' Compensation Act was exclusive—a view which it later applied to the present *Johansen* case.

In *Haselden* v. *United States,* 24 F. 2d 529 (E.D. N.Y.), suit was brought by crew members in the regular navy. The district court was asked to distinguish the *O'Neal* case on the ground that there the Federal Employees' Compensation Act was involved. It refused, declaring (at p. 530) that the same "well-established policy of the government is shown in the pension laws" applicable to military crew members. The Second Circuit affirmed *sub nom. Dobson* v. *United States,* 27 F. 2d, certiorari denied, 278 U.S. 653. The court conceded that jurisdiction appeared to have been granted: "Verbally, there is nothing which excludes liability for damage to property or person of officers or crew." Recovery by suit "would be too great a reversal of policy to be enacted by such general terms." If crew members are to have a right to recover for injury "by the unseaworthiness of a public vessel, or by the fault of one another, because that is what in the end it comes to, we cannot think it would have been left to such general language as is to be found

in the above—quoted section 1" (46 U.S.C. 781) of the Public Vessels Act (27 F. 2d at 808). In *Bradey* v. *United States,* 151 F. 2d 742, certiorari denied, 326 U.S. 795, the Second Circuit once more conceded that nothing prevented jurisdiction of suits under the Public Vessels Act by crew members, but explained "because of the compensation elsewhere provided for such persons, they must be deemed excluded from its protection." The court again refused to distinguish military from civil service crew members, observing: "The compensation provided for the Navy is indeed not the same as that provided under the United States Employees Compensation Act, 5 U.S.C.A. § 751 et seq.; but that makes no difference. We are to assume that each is deemed adequate for the occasion; particularly since it is certain, and does not depend upon proof of fault. We conclude that Congress regards the two remedies as mutually exclusive * * *" (151 F. 2d at 743).

Some language in these cases seems to conclude not merely that the libel is dismissed for lack of a cause of action, but also for want of jurisdiction. And they have been attacked on that ground as overruled. But the language used is no more than a form of words. As Justice Holmes said of a similar situation, where courts have only a limited jurisdiction, if there is no right of action the claim is of a kind that the court not only ought not to enforce but obviously has been granted no power to

enforce. *The Ira M. Hedges*, 218 U.S. 264, 270. Since the courts have only a limited jurisdiction of suits against the Government it is easily said that there is no *jurisdiction* when what is meant is that the claim does not constitute a right of action which could lead to liability.

While the rule of exclusiveness was thus being established by the Second Circuit with respect to public vessel crew members of both the civil and military service, the same rule was being elsewhere applied to shoreside civil service employees. *Posey* v. *Tennessee Valley Authority*, 93 F. 2d 726 (C.A. 5); *Thomason* v. *W.P.A.*, 47 F. Supp. 51 (D. Idaho), affirmed, 138 F. 2d 342 (C.A. 9); *White* v. *T.V.A.*, 58 F. Supp. 776 (E. D. Tenn.).[41] But a contrary result was reached by the Fourth Circuit in 1946 with respect to a regular shoreside civil service employee suing under the Suits in Admiralty Act in *United States* v. *Marine*, 155 F. 2d 456. The court ignored the *O'Neal, Lopez, Posey* and other previous contrary decisions, declared the Second Circuit's dicta in *Dobson* and *Bradey* inapplicable, and refused to consider that the admitted existence of jurisdiction was not conclusive of the existence of a right of action in libelant. The court declared that this Court's dictum in *Brady* v. *Roosevelt SS Co.*, 317 U.S. 575, 577, that "we may assume that

[41] The T.V.A. cases appear especially strong. It was contended that T.V.A., like the Panama R. R. Co., was a corporation distinct from the United States, and recovery by suit should be granted by analogy. The Fifth Circuit held otherwise (93 F. 2d at 728).

petitioner could have sued either the United States or the [Maritime] Commission under the Suits in Admiralty Act" was dispositive of the entire matter and that in the light of its context "the whole opinion in the Brady case was intended as a complete coverage of the subject" (155 F. 2d at 458).

The third case involving a civil service crew member of a public vessel was *United States* v. *Loyola*, 161 F. 2d 125 (C.A. 9). A member of the civil service component of the crew of the Army Transport *Etolin* recovered a district court judgment for maintenance and cure under the Tucker Act. The United States appealed on both the ground that libelant, having refused the medical treatment tendered by the Government, lost his right to claim maintenance money under the general maritime law as well as his right to claim compensation payments under the Compensation Act, and the further ground that nevertheless libelant's right to compensation was exclusive. The court never reached the problem of whether libelant's compensation rights remained exclusive although in the special circumstances he had forfeited them.[42]

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[42] The opinion (at p. 126) indicates that the jurisdiction of the court was questioned. However, the Government's brief (p. 17) expressly conceded that "despite compensation and pension acts, jurisdiction continues unabated under any applicable jurisdictional acts" but argued that compensation is exclusive and therefore bars "recovery in a suit under the jurisdictional act." The situation was repeated in *Johnson* v. *United States*, 186 F. 2d 120 (C.A. 4), where the court treats the Government as having challenged the jurisdiction although the Government's brief expressly stated, "although

The fourth and last decision, before the 1949 amendments, to involve the rights of civil service crew members of public vessels was that of the district court in the *Mandel* case (MR. 23; 74 F. Supp. 754). Just as in the *Marine* case, on which the opinion principally relied,[43] the district court failed to consider the *O'Neal* and *Lopez* cases and ignored the difference in rights between merchant seamen, on the one hand, who are denied compensation and related benefits and whose right of action is exclusive, and public vessel seamen, on the other hand, who enjoy such rights whether they belong to the civil or military service component of the crew. Despite the contrary command of Con-

jurisdiction to bring the suit exists, recovery against the United States cannot be had where the public vessel crew members are entitled to receive payments of compensation or pension benefits." State compensation decisions conform to this view. The defense that compensation is applicable and exclusive is not absence of jurisdiction in the court, for the court has jurisdiction of all torts, but lack of any right of action in the plaintiff. Accordingly, unless the right to compensation appears on the face of plaintiff's pleading, the matter must be presented by plea or answer, not by demurrer, exceptions, or motion to dismiss, and the burden is on the employer to establish the applicability of the compensation statute to the death or injury in suit. 58 Am. Jur. p. 615; 71 Corp. Jur. pp. 1500, 1502. *Hogan* v. *Buja*, 262 Fed. 224 (E.D. La.); *Kemper* v. *Gluck*, 327 Mo. 733, certiorari denied, 284 U.S. 649; *Beveridge* v. *Illinois Fuel Co.*, 283 Ill. 31; *Noble* v. *Detroit Taxicab & Trf. Co.*, 222 Mich. 414; *Jirout* v. *Gebelein*, 142 Md. 692.

[43] *Krey* v. *United States*, 123 F. 2d 1008 (C.A. 2), is also cited, apparently, as involving recovery by a public vessel crew member (MR. 26). See also the Third Circuit's opinion (MR. 108, fn. 15). While the *Krey* opinion states that jurisdiction was under the Public Vessels Act, the record and file papers show the libel (Art. 10) invoked jurisdiction under the Suits in Admiralty Act, the answer admitted it, and the vessel was in fact operated for the Maritime Commission as a merchant vessel.

gress in the Clarification Act, the opinion states "a seaman's remedies should not vary with the nature of the vessel upon which he is employed" (MR. 26; 74 F. Supp. at 755).

Thus it appears that at the time the 1949 Compensation Act amendments were under consideration the cases respecting public vessel crew members were in conflict, just as were those involving shoreside employees. In the cases of *O'Neal* and *Lopez*, the District Courts for the Eastern and Southern Districts of New York had held, with the apparent approval of Second Circuit; that the benefits of the Federal Employees' Compensation Act are exclusive in the case of beneficiaries who are crew members of public vessels. On the other hand, the district court below in the *Mandel* case had held such benefits not to be exclusive. Finally, the Ninth Circuit in the *Loyola* case had agreed with the Government that there was jurisdiction but did not reach or decide the question of exclusiveness.

B. *The Legislative History of the Proviso excepting Crew-Members from the Exclusiveness Provision of the Bill Which Became the Federal Employees' Compensation Amendment Act of 1949, Establish That Congress Did Not Intend to Alter the Pre-existing Law Relating to Exclusiveness.*

The inception of the amendment to Section 7

of the Federal Employees' Compensation Act of 1916 (5 U.S.C. 757), which added a new paragraph (b) declaring in express terms the exclusiveness of compensation when available (*infra*, p. 100), was the desire to resolve the conflict between the various decisions discussed above (*supra*, p. 78 *et seq.*), without requiring extended litigation of cases and eventual resolution by this Court. Since the rights of private and WSA/NSA merchant seamen had previously been settled by excluding both groups from compensation and making exclusive their right of action for damages, unseaworthiness, maintenance, cure and wages, it appears not to have been thought that any question of the rights of crew members was involved. The hearings were not participated in by either the Army and Navy or by any seamen's groups. The amending bill, H.R. 3191, 81st Cong., 1st Sess., including the declaratory provision as to exclusiveness, passed the House (95 Cong. Rec. 8764) and was favorably reported in the Senate by the Committee on Labor and Public Welfare (S. Rep. 836).[44] The seamen's unions, however, became apprehensive lest it might change the existing law, repeal the Clarification

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[44] Commenting on this provision of the bill, the Senate Report stated: "SEC. 201. Section 7 of the act would be amended by designating the present language as subsection '(a)' and by adding a new subsection '(b)'. The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities * * *" (S. Rep. 836, p. 23).

Act's exclusion, and bring merchant seamen back under the Compensation Act.[45] The union representatives requested Senator Morse of Oregon to offer, on their behalf, certain floor amendments at the last moment of consideration of the bill.

Contrary to the implication of petitioner Mandel (Br. 16), the floor amendments offered by Senator Morse did not represent committee action. Throughout, Senator Morse accurately referred to the amendment as "my amendment" and Senator Douglas of Illinois, in charge of the bill, insisted upon the insertion in the Congressional Record of his statement giving his interpretation of the Morse floor amendments and his reason for accepting them (95 Cong. Rec. 13607).

Senator Morse repeatedly emphasized that the amendments were intended to preserve the pre-existing law for resolution by the courts. Thus he declared:

> In effect it continues the seamen in exactly the same legal position which they presently enjoy [95 Cong. Rec. 13607].
>
> * * * * *
>
> The representatives of maritime unions are now strongly urging, since the bill was placed

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[45] "While the House report on the bill (House Rept. No. 729, p. 13) states that it is not intended to repeal this specific statutory exclusion, doubts have been expressed as to whether the bill and the explanation in the House report would have the intended effect" (95 Cong. Rec. 13608).

on the Senate Calendar, that their right to sue the United States under maritime law be preserved and that they be kept in status quo. * * *

* * * * * *

* * * In short, the amendment is intended merely to preserve the status quo as to seamen. If the Congress should decide to go into this matter further at some future session, it could then do so without delaying the enactment of this urgently needed bill. [95 Cong. Rec. 13608.]

Senator Morse also intimated that the judicial interpretations of the existing law were in conflict and the amendments were only to preserve any rights the seamen might eventually be held to have. His prepared statement read (95 Cong. Rec. 13608):

* * * The new subsection [(b) of Section 305] would make clear that no provision of this amending act, *as distinguished from the existing Compensation Act itself*, shall be construed to affect any maritime rights or remedies of seamen. *The purpose is to reserve to seamen whatever rights they now have, or may be held to have,* under maritime law * * * [emphasis supplied].

His statement further pointed out in the same connection that one of his amendments would save the compensation rights of litigants in case the Government's position was upheld. It said (95 Cong. Rec. 13609):

> * * * it is provided that persons whose pending claims are dismissed on jurisdictional grounds, insufficiency of the pleadings, or *because the remedy under the Compensation Act is exclusive*, may file claim under the Compensation Act within similar time limitations" [emphasis supplied].

Senator Douglas, who was in charge of the bill, stated that the controlling reason for accepting the Morse amendments was the absence of hearings. This circumstance we have already adverted to; neither the defense departments nor the seamen had been heard with respect to either the original declaratory amendment to Section 7 of the Compensation Act or the Morse floor amendments. The statement of Senator Douglas said in pertinent part (95 Cong. Rec. 13609):

> Mr. President, I should like to state my ground for agreeing to the amendments offered by the Senator from Oregon. The primary consideration for accepting the Senator's amendments preserving the maritime rights and other statutory remedies of seamen is the fact that no hearings were held, no arguments were heard, and no discussion was had on this aspect of the pending bill.
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> * * * * *
>
> It is my further understanding that this bill as amended will only change the status quo of seamen to the extent that it increases compensation rights of those Government-employed seamen covered by the act. For the same rea-

> son, namely, that we have had no hearings on the matter, we are not seeking to legislate affirmatively as to certain claims and denials of a right of election of remedies under existing laws, which claims and denials have not yet been adjudicated by the Supreme Court, although various other Federal courts have, in effect, held that federally employed seamen have such an election.
>
> In short, until the matter may be more fully considered by Congress, we seek by the amendments merely to make sure that seamen shall lose no existing rights.

As thus amended, the bill passed the Senate (95 Cong. Rec. 13609). A week later the House accepted the Senate amendments without debate (95 Cong. Rec. 14060).

It is thus abundantly plain that both Senator Morse, acting at the request of the unions, and Senator Douglas, in charge of the bill, meant to preserve the preexisting law, including the distinction between the rights of crew members of Army and Navy vessels enjoying the right to Federal Employees' Compensation and WSA/NSA merchant seamen whose exclusive right is by suit under the Suits in Admiralty Act.

In the light of the circumstances related above, we believe that petitioners err in asserting that the acceptance of the Morse floor amendments constituted Congressional adoption of the view of the district court in the *Mandel* case (MR. 26) that

public vessel crew members have both a right to compensation and a right of action. We submit that it plainly appears that Congress has left the entire matter for final resolution by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the exclusive right of public vessel crew members, such as petitioner Johansen and the decedent of petitioner Mandel, for service-incident injury, sickness, or death is the benefit of the applicable federal compensation, paid leave, and retirement statutes, and accordingly that the judgments of the courts below should be affirmed.

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FEBRUARY 1952.

APPENDIX

1. The pertinent provisions of the Public Vessels Act of March 3, 1925, c. 428, 43 Stat. 1112, are as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920.

* * * * *

> SEC. 4. That no officer or member of the crew of any public vessel of the United States may be subpoenaed in connection with any suit authorized under this Act without the consent of the secretary of the department or the head of any independent establishment of the Government having control of the vessel at the time the cause of action arose, or of the master or commanding officer of such vessel at the time of the issuance of such subpoena.

* * * * *

> SEC. 9. The United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the

owners, charterers, operators or agents of vessels.

* * * * *

2. The pertinent provisions of the Federal Employees' Compensation Act of September 7, 1916, c. 458, 39 Stat. 742, are as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States shall pay compensation as hereinaffer specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.

* * * * *

SEC. 7. That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States.

SEC. 8. That if at the time the disability begins the employee has annual or sick leave to his credit he may, subject to the approval of the head of the department, use such leave until it is exhausted, in which case his compensation shall begin on the fourth day of disability after the annual or sick leave has ceased.

* * * * *

SEC. 26. If an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the commission may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the commission may require said beneficiary to prosecute said action in his own name.

If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the commission, he shall not be entitled to any compensation under this Act.

The cause of action when assigned to the United States may be prosecuted or compromised by the commission, and if the commission realizes upon such cause of action, it shall apply the money or other property so received in the following manner: After de-

ducting the amount of any compensation already paid to the beneficiary and the expenses of such realization or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury.

SEC. 27. That if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

(B) If no compensation has been paid to him by the United States, he shall credit the

money or other property so received upon any compensation payable to him by the United States on account of the same injury.

* * * * *

SEC. 36. The commission, upon consideration of the claim presented by the beneficiary, and the report furnished by the immediate superior and the completion of such investigation as it may deem necessary, shall determine and make a finding of facts thereon and make an award for or against payment of the compensation provided for in this Act. Compensation when awarded shall be paid from the employees' compensation fund.

* * * * *

SEC. 41. That all Acts or parts of Acts inconsistent with this Act are hereby repealed: *Provided, however,* That for injuries occurring prior to the passage of this Act compensation shall be paid under the law in force at the time of the passage of this Act: *And provided further,* That if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in the Panama Railroad Company to pay damages therefor under the laws of any State, Territory, or possession of the United States or of the District of Columbia or of any foreign country, no compensation shall be payable until the person entitled to compensation releases to the Panama Railroad Company any right of action which he may have to enforce such liability of the Panama Railroad Company, or until he assigns to the

United States any right which he may have to share in any money or other property received in satisfaction of such liability of the Panama Railroad Company.

* * * * *

3. The pertinent provision of Title VI of the Public Health Service Act of July 1, 1944, c. 373, 58 Stat. 712, is as follows:

SEC. 605. (a) Section 7 of the Act of September 7, 1916, entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", as amended (U. S. C., 1940 edition, title 5, sec. 757), is amended by changing the period at the end thereof to a colon and adding the following: "*Provided*, That whenever any person is entitled to receive any benefits under this Act by reason of his injury, or by reason of the death of an employee, as defined in section 40, and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury or death under any other Act of Congress, because of service by him (or in the case of death, by the deceased) as an employee, as so defined, such person shall elect which benefits he shall receive. Such election shall be made within one year after the injury or death, or such further time as the Commission may for good cause allow, and when made shall be irrevocable unless otherwise provided by law."

* * * * *

4. The pertinent provisions of the Federal Employees' Compensation Act Amendments of October 14, 1949, c. 691, 63 Stat. 854, are as follows:

SEC. 201. Section 7 of the Federal Employees' Compensation Act, as amended (5 U. S. C., 1946 edition, sec. 757), is further amended by inserting the designation "(a)" immediately before the first sentence thereof and by adding to such section a new subsection reading as follows:

"(b) The liability of the United States or any of its instrumentalities under this Act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however,* That this subsection shall not apply to a master or a member of the crew of any vessel."

* * * * *

SEC. 302. The provisions of this Act shall not be construed to authorize the payment of

any compensation under the Federal Employees' Compensation Act in any case where, pursuant to private relief legislation, a beneficiary of such legislation has accepted payment of a grant in satisfaction of the liability of the United States (or its corporation, agency, or other instrumentality) in such case, or where such liability has been compromised and settled, or other satisfaction received, as the result of any action sounding in tort or under maritime law, or where a lump sum has been received under section 14 of the Federal Employees' Compensation Act and the lump-sum award is not modified or set aside for other reasons.

SEC. 303 * * *

(g) The amendment made by section 201 of this Act to section 7 of the Federal Employees' Compensation Act, making the remedy and liability under such Act exclusive except as to masters or members of the crew of any vessel, shall apply to any case of injury or death occurring prior to the date of enactment of this Act: *Provided, however,* That any person who has commenced a ~~civil~~ action or an action in admiralty with respect to such injury or death prior to such date, shall have the right at his election to continue such action notwithstanding any provision of this Act to the contrary, or to discontinue such action within six months after such date before final judgment and file claim for compensation under the Federal Employees' Compensation Act, as amended, within the time limited by sections 15 to 20 of such Act (including any extension

of such time limitations by any provision of this Act), or within one year after enactment of this Act, whichever is later. If any such action is not discontinued and is decided adversely to the claimant on the ground that the remedy or liability under the Federal Employees' Compensation Act is exclusive, or on jurisdictional grounds, or for insufficiency of the pleadings, the claimant shall, within the time limited by sections 15 to 20 of such Act (including any extension of such time limitations by any provision of this Act), or within one year after final determination of such cause, whichever is later, be entitled to file a claim under such Act.

* * * * *

SEC. 305. (a) Nothing contained in this Act shall be construed to affect the exclusion of certain seamen (as defined in the Act of March 24, 1943, ch. 26, 57 Stat. 45, as amended; 50 U. S. C., Appendix, sec. 1291) from the terms of the Federal Employees' Compensation Act, as provided by such Act of March 24, 1943, as amended.

(b) Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel.

* * * * *

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